(26,397)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 389.

WILLIAM F. HAYS, APPELLANT,

vs.

PORT OF SEATTLE, THE STATE OF WASHINGTON, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

INDEX.

	Original.	Print
Names and addresses of counsel	1	1
Bill of complaint	2	1
Order to show cause and return	18	12
Answer of Port of Seattle	20	13
Answer of Seattle and Montana Railroad Company	26	17
Motion to dismiss complaint	30	19
Order dismissing action as to Tanner, Attorney General	31	20
Decree	32	21
Assignment of errors	34	22
Petition for appeal	39	25
Order allowing appeal	40	26
Bond on appeal	40*a*	26
Index to evidence, &c.	42	28
Testimony of W. F. Hays	45	30

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 27, 1919.

	Original.	Print
Testimony of Frank T. Hunter	108	64
P. D. Hamlin	113	67
Paul P. Whitham	118	69
W. F. Hays (recalled)	123	72
Motion for nonsuit, &c.	123	72
Testimony of Maud S. Tamblin	127	74
A. H. Gillis	132	77
J. J. Cryderman	139	80
Robert Bridges	145	83
W. F. Forrest	166	95
J. J. Cryderman (recalled)	168	96
Elmer E. Adams	172	98
J. R. West	179	102
Maud S. Tamblin	189	108
J. R. West (recalled)	193	110
Robert Bridges (recalled)	196	112
W. F. Hays (recalled)	205	118
P. D. Hamlin (recalled)	214	123
Harold Preston	216	124
W. F. Hays (recalled)	220	126
John E. Shoemaker	223	127
Citation and service (copy)	227	130
Præcipe for record by plaintiff	229	131
Clerk's certificate	231	132
Certified copy of opinion of Neterer, J.	233	133
Citation and service	245	142

United States District Court, Western District of Washington, Northern Division.

No. 47-E.

WILLIAM F. HAYS, Plaintiff,

vs.

ORT OF SEATTLE, a Municipal Corporation of the State of Washington, et al., Defendants.

Names and Addresses of Counsel.

William F. Hays, Esq., Solicitor for Complainant, 1405 L. C. mith Building, Seattle, Washington.
Will H. Thompson, Esq., Solicitor for Complainant, 329 Lyon ilding, Seattle, Washington.
C. J. France, Esq., Solicitor for Defendant, Port of Seattle, 436 rke Building, Seattle, Washington.
F. G. Dorety, Esq., Solicitor for Defendant, Seattle & Montana ilway Company, a corporation, King Street Station, Seattle, Wash-gton.

In the United States District Court for the Western District of Washington, Northern Division.

No. 47.

WILLIAM F. HAYS, Complainant;

vs.

T OF SEATTLE, a Municipal Corporation of the State of Washing-on; H. M. Chittenden, President, C. E. Remsburg and Robert ridges, Commissioners of said Port of Seattle; W. V. Tanner, ttorney General of the State of Washington, and Seattle & lontana Railway Company, a Corporation, Defendants.

Bill in Equity.

he Honorable Judges of said court in equity sitting:

mplainant brings this his Bill of Complaint against the de-ants and respectfully represents unto your Honors:

I.

e complainant is and at all the dates hereinafter mentioned citizen of the United States over the age of twenty-one years,

residing at Seattle, King County, in the State of Washington, and was and during all of said times and now is a taxpayer therein.

II.

That the defendant, Port of Seattle, is a municipal corporation of the State of Washington, and was duly created pursuant to an Act of the Legislature of the State of Washington entitled: "An Act Authorizing the Establishment of Port Districts, etc.," known as House Bill 426, approved March 14th, 1911, Chapter 92, pages 412-426 inclusive, Laws of Washington for 1911; said Act amongst other things authorized the creation of port districts and the election of three (3) Port Commissioners to serve without pay as the executive head of such Port, to be known as "Commissioners" of
3 any such district. That pursuant to said Act, the defendant, Port of Seattle, was duly established, and the said H. M. Chittenden, President, C. M. Remsburg and Robert Bridges were duly elected as Commissioners for said Port, who thereupon duly qualified and ever since have been and now are acting as the Commissioners for and as the executive head of said defendant, Port of Seattle, State of Washington. That the defendant, W. V. Tanner, is a citizen of the United States residing in and is the Attorney General of the State of Washington, authorized by law to enforce all laws of the State of Washington.

III.

That at all the dates hereinafter mentioned the defendant, Seattle & Montana Railway Company, was and now is a corporation duly existing in the State of Washington, known as the Great Northern Railway Company, dong business for profit in the State of Washington, and maintaining offices in the City of Seattle, King County, Washington.

IV.

That on the 3rd day of August, 1895, at Olympia, the State of Washington, by its duly authorized agent, the Commissioner of Public Lands, entered into a contract with the above named complainant, William F. Hays, and one Frank Shay, and on the 26th day of February, 1896, made and entered into a modification of said contract, under and by virtue of an Act of the Legislature of the State of Washington, approved on the 9th day of March, 1893, entitled: "An Act Prescribing the Ways in Which Waterways for the Uses of Navigation May be Excavated by Private Contract, Providing for Liens Upon Tide and Shore Lands Belonging to the State, Granting Rights of Way Across Lands Belonging to the State;" which contract so modified, was duly approved by the Governor of the State of Washington on the 7th day of March, 1896, pursuant to said Act.

4 That afterwards, on the — day of ——, 1896, the complainant and said Frank Shay duly filed with the Commis-

sioner of Public Lands, a bond in the penal sum of Twenty-five Thousand Dollars ($25,000.), the same being the amount of the bond provided for by said contract, which said bond was then and there duly approved by said Commissioner of Public Lands and duly accepted, and ever since has been and now is in full force and effect, said bond being conditioned for the faithful performance of said contract.

That said contract provided for the excavation of a certain public waterway known as Smith's Cove Waterway, in said Seattle Harbor, and the filling in and raising above high tide of all of the lands covered by said contract situated in said Smith's Cove and adjacent to said waterway belonging to the State of Washington, and further provided that said complainant, William F. Hays, and said Frank Shay, and their heirs and assigns, should have a lien as in said Act provided, upon all the tide and shore lands then belonging to the State of Washington described in said contract; that said William F. Hays and Frank Shay, their heirs and assigns, should from the earth so excavated in said waterway, fill in and raise above high tide said lands, and that the said State should hold such shore and tide lands subject to the operation of said contract, pending its execution, and subject to the ultimate lien thereon; and, further, said contract provided for and specified the character of the retaining wall or bulkheads to be used, said State reserving, however, the right to modify said plan of bulkheads and retaining wall as to "shape, form and kind of material" as might be shown necessary from experiment or otherwise, with ample power of deviation to meet necessary requirements, unforeseen difficulties, etc., provided, however, in said contract that if such changes or modifications in the character of the bulkhead, or if any change in its plan of construction (if made after the 3rd day of February, 1896, or after said work began under said contract) should entail an increased cost over sixteen cents (16c.) per cubic yard provided for in said contract plus fifteen per cent (15%) calculated on such cost as complainant's profit, such increased cost over said sum should be added to the contract price for such and paid to the contractor as his compensation and profit as therein provided, and that all of said lands to be filled including said waterway, were to be retained by the State in the same condition as regards the necessary cost of filling as they were at the time of the making of said contract; and said contract further provided that as a condition of its final approval by the Governor of the State of Washington (it appearing that the earth necessary and required to complete the filling of the tide lands embraced in said contract to be obtained from the waterway described in said contract, was found upon calculation to be inadequate in amount to complete said filling), and for the purpose of the completion of said filling, the State, through its Governor, as a condition to the performance of said contract, and in consideration of the Governor's approval of the contract, supplemented said contract with the requirement that the contractors should excavate such additional earth to complete the filling of said tide lands, from the uplands lying between the said Smith's Cove

and what is known as Salmon Bay, and under the direction of the engineers of the United States and of the State of Washington; it being the design and intention of all parties to continue said proposed waterway at Smith's Cove to connect same at Salmon Bay with the proposed Government Canal through the uplands between said Smith's Cove and said Salmon Bay, said contractors to be furnished the right of way across said uplands, free of all cost to them, or fair compensation therefor to be furnished, and within the time limited for the completion of said contract, it being further provided therein that if the said State failed to provide such right of way or such compensation therefor to the contractors within the time limited by the contract, then the contractors would be relieved from completion of said contract as provided by the limitation therein.

6 And it is further provided in said Act that upon the letting of said contract, the State of Washington, through its proper officers, to-wit: the tide land appraisers appointed in the County in which said tide lands lie, shall forthwith appraise the tide lands which it is proposed to fill in by the excavation of such waterway, "at their actual value at the time of letting said contract and the said lands so appraised shall never be disposed of by the State for less than such appraised value."

And it is further provided in said Act that the Commissioner of Public Lands should have the right thereunder to extend the time for the beginning or completion of said work under said contract and that it would do and perform by its authorized agents all and singular the acts and things mentioned in the said Act of the Legislature to be done and performed by the State of Washington, said Act being made an integral part of said contract and embodied therein, and accepted by the complainant and the State of Washington as such.

And said contract duly specified the waterway proposed to be excavated and the lands to be affected thereby and was accompanied by a map of the locality and its relation to the harbor lines and reservation in front of said City of Seattle, which map is hereby referred to and made a part of this Bill, and duly showed the tide and shore lands to be filled and raised above the high tide, properly designated subdivisions of abutting uplands as the proper location of said waterway permitted, and duly specified and exhibited the said waterway proposed to be excavated as to its depth and width and extent, said waterway having been duly established by the Harbor Line Commissioners of the State of Washington, a copy of which contract and "Contract Modified" being duly made a public record and having been duly recorded in the Auditor's Office of King County, Washington.

That on the 25th day of July, 1895, said Frank Shay for a good and valuable consideration, duly sold, transferred and as-

7 signed to said complainant, William F. Hays, all his right title and interest in and to the application for contract, and in and to any and all contracts made thereunder, and on, to-wit the 7th day of March, 1896, said Frank Shay duly sold, transferred

and assigned to the complainant, William F. Hays, all his right, title and interest in and to said contract so modified, and said assignment was duly filed with and accepted by his bondsmen and by the Commissioner of Public Lands of said State, and the complainant has ever since been and now is the owner and holder of said contract and all the right, title and interest therein, and entitled to enforce all rights in law and equity thereunder against all persons and corporations, including these defendants, or the State of Washington.

V.

That on the 4th day of May, 1896, the complainant duly entered upon the performance of his said contract, and commenced driving piles for the construction of the bulkhead as required by said contract, and procured for said purpose several thousand piles necessary for the construction of said bulkhead, and underwent an expense of several thousand dollars for the getting ready and for the object of fully carrying out and completing such work provided by said contract, and fully performing the same duly and legally, but on or about the 5th day of May, 1896, while so at work performing his said part of said contract, complainant was duly notified by the Commissioner of Public Lands of the State of Washington, as was his right under the law, that he had elected to exercise the right provided by said contract of changing the form of bulkhead to be used by complainant under the terms of said contract, and would proceed to formulate and prescribe further plans for the construction of such new style of bulkhead which would be required by the State in carrying out said contract, and thereupon notified and required and ordered complainant to suspend operations under said contract until such plans and specifications for such new style of
8 bulkhead should be determined upon and communicated to complainant and publicly announced. Whereupon said complainant did, by order of said commissioner acting for said State of Washington, suspend work under said contract and not otherwise, and neither said commissioner nor said State have yet advised complainant of the kind of bulkhead required, nor has the commissioner withdrawn his order commanding this complainant to cease work on the said filling in of said tide lands, or in the fulfilling of his said contract.

That shortly after the said action of the Commissioner aforesaid suspending operations on said work by complainant, and on or about, to-wit, the 13th day of November, 1896, said Commissioner notified this complainant to further suspend operations under said contract on account of the construction of the proposed Government Canal known as the "North Canal" referred to in said contract, but continued said contract in all its provisions and benefits, rights and privileges, in every wise as the same was theretofore. That long prior to this action, to-wit, about November 17th, 1898, complainant in order to protect his rights under said contract against the wrongful encroachments of the defendant, Seattle & Montana Railway Co. and others, prosecuted a suit in the Superior Court of Kings County,

Washington, the judgment on which is reported in 23rd Washington at pages 730-742 inclusive, by which it was found and decided that said contract was in all things duly existing, and complainant was held to have the right to collect from said Seattle & Montana Railway Co. the profit due him on all lands by said road filled or withdrawn from the operation of said contract, bottomed upon the cost of filling the same, amounting then to the sum of Sixty-nine Thousand Dollars ($69,000) payable to this complainant, when said contract shall have been fully performed, and complainant has at all times since the making of said contract and the commencement of the work upon said contract, been and now is ready to carry out all the terms and conditions of said contract, and is willing and prepared so to do, and would have done so within the time
9 named in said contract if he had not been prevented from so doing by the aforesaid acts and omissions of said State of Washington, and of the defendant as hereinafter alleged; and complainant has at all times done and performed each and every requirement under said contract on his part to be done and performed to entitle him to the rights and benefits thereunder, and to perpetuate the said lien upon said lands in question under said contract as provided by law and by said contract.

VI.

That this complainant has from time to time duly applied to the Commissioner of Public Lands of the State of Washington, since the making of said contract, once or more times during each of said years and within the current past year, and immediately before the bringing of this action, requesting said Commissioner of Public Lands of the State of Washington to fix specifications and a plan of bulkhead practicable for said waterway, and to provide and furnish complainant with the right-of-way across said neck of land connecting said waterway with said Salmon Bay at Smith's Cove, and to furnish complainant with the unobstructed right to proceed under his said contract in the performance thereof, but the said Commissioner of the State of Washington, and each thereof, refused to do so, giving at such times as the paramount reason for not so doing, that the Government Canal above referred to was yet in process of construction at Salmon Bay and that it was impracticable to fix a plan of bulkhead for said waterway at Smith's Cove, or to furnish said right-of-way across said neck of land until it was definitely known and settled that such waterway would not be required for joint use by and between the State of Washington and the United States of America by virtue of said proposed North Canal, and complainant has at all times been and is now ready and prepared to proceed under his said contract as aforesaid.

10 VII.

That the State of Washington, by virtue of her sovereignty, became the owner of all lands covered by the ebb and flow of the tide, known as tide lands, and pursuant to its constitution, by Act of

March 26th, 1890, made provision for the classification, appraisal and sale thereof, and thereafter by Act of the Legislature of the State of Washington, entitled "An Act Prescribing the Ways in Which Waterways for the Use of Navigation May Be Excavated by Private Contract etc.," House Bill 349, approved March 9th, 1893, made provision for the entering into private contracts as above set forth for the excavation of waterways and the filling in and improving of adjacent tide lands, and thereafter the State by an Act duly approved on March 26th, 1895, Laws of Washington, Chapter 178, pages 527-571 inclusive, by which said Act of March 26th, 1890, was repealed and the tide lands of Seattle Harbor were, pursuant to said Act of 1895, duly surveyed, platted into lots and blocks and appraised for the purpose of sale, and waterways were therein duly established, and the lands included in said waterways, were by said Act, forever reserved from sale for the purpose of the use of the earth therein in filling and reclaiming the adjacent tide lands and for use as public waterways.

VIII.

That after the making of said contract with complainant for the excavation of the waterway and filling said lands at Smith's Cove above referred to, the State, pursuant to said Act of 1895, sold to divers persons, firms and corporations, all of the said tide lands located in Smith's Cove, at their then appraised price, which was a nominal price as compared to their real value when so filled as contemplated in said Act, said sale, however, being made subject to said contract for their filling and reclamation, carrying therewith such future lien for such work of improvement of said lands as a charge thereon to be paid by the purchasers thereof in addition to said appraisal price, and in pursuance of the laws aforesaid.

1 IX.

That the defendant, the Seattle and Montana Railway Company, commonly known as the Great Northern Railway Company, purchased from the State, and from time to time thereafter from divers persons, a large area of said tide lands at said Smith's Cove at their said nominal or appraised value, long after the making of the contract aforesaid with this complainant, and said defendant has ever since been and now is the owner thereof, and said defendant ever since its said purchases, has at all times wrongfully resisted the claims of this complainant under his said contract and has disregarded the conditions of its said purchases and of said contract, and the rights of complainant and of the State of Washington thereunder, by the acts aforesaid, and complainant shortly before the bringing of this action was informed and verily believes and so charges the facts to be that said defendant Railway Company, its officers, agent sand servants, have during the past two (2) years entered into a conspiracy with said Commissioners of said defendant, Port of Seattle, or some of them, to defeat the said contract for the double purpose of and in order to relieve the defendant Railway

Company from paying for the filling of its said lands and from paying to complainant the fifteen percent (15%) profit due him under said decision, and to avoid paying the State for the cost of filling said tide lands, and to deprive complainant of the profit due him under said contract on said lands so purchased by it, as also the lands by it so withdrawn from the operation thereof and referred to above, and as a part of said conspiracy said defendant, Railway Company, in order to escape the payment of said cost of filling its said lands, its officers and agents, actively assisted and joined with said Commissioners or some of them, in obtaining the enactment into law that certain House Bill No. 478, approved March 11th, 1913, Chapter 59, page 195, Laws of Washington, entitled: "Granting Smith's Cove Waterway to the Port of Seattle," a copy of which law is herein incorporated and made a part hereof, and is in words and figures to-wit:

12 "An Act Vacating a Portion of Smith's Cove Waterway, in the City of Seattle, and Vesting the Title of the Vacated Portion in the Port of Seattle.

Be it enacted by the Legislature of the State of Washington:

Section 1. That all of that portion of Smith's Cove Waterway in the City of Seattle, north of the southerly line of Garfield Street in said City of Seattle, as the same appears upon the plat of said City, be, and the same is hereby vacated as a Waterway of the State of Washington.

Section 2. After the date of the passage and approval of this Act and the time when the same shall become effective, the title to all that portion of the said Smith's Cove Waterway hereby vacated shall be vested in the Port of Seattle: Provided, however, that before such vacation shall become effective, or the title to said property shall vest in said Port of Seattle, the said Port of Seattle shall procure the consent of all owners of property abutting upon the said waterway of said vacation, but the said Port of Seattle shall possess no right to acquire any such consent by the exercise of the power of eminent domain, or by any proceeding whatever, against the will of any such abutting owner."

Passed the House March 7th, 1913.
Passed the Senate March 11th, 1913.
Approved by the Governor March 11th, 1913.

X.

That the defendant, Port of Seattle, did not after the passage of said Act, nor at any other time, obtain the consent of this complainant *of* the vacation of said waterway nor any part nor portion thereof, and has at no time given complainant any notice whatever of any proposed vacation of said waterway, or of said Port's intention to occupy said waterway, as the "owner" thereof or otherwise, in pursuance of said Act or at all, and notwithstanding, this com-
13 plainant was at all times and still is the owner of said con-

tract, said defendant, Port of Seattle, by its said Commissioners, since the passage and approval of said last above mentioned Act and pursuant thereto, as complainant is informed and believes and so charges, has wrongfully taken possession of said waterway, and now is exercising acts of absolute ownership of said waterway and the whole thereof, without any compensation whatsoever to complainant, and said Port has without notice to or consent of complainant, wrongfully constructed and built along the sides of said waterway upwards of 10,000 feet of a so-called bulkhead, contrary to and different from the bulkhead required by said contract, which complainant will be required to remove in order to perform his said contract, adding a necessary cost of at least Eight Dollars ($8.00) per lineal foot to the damage of complainant of at least Eighty Thousand Dollars ($80,000). Also, said defendant, Port, has wrongfully in pursuance of said Act, constructed in and across said waterway at said Garfield Street a distance of four hundred (400) feet, a so-called bulkhead consisting of piles driven therein to great depths and brush interlocked, totally obstructing thereby all navigation of said waterway beyond said Garfield Street, violative of said contract, which complainant will be compelled to remove in order to perform the said contract, and which will cost plaintiff at least the sum of Five Thousand Dollars ($5,000). Also, said Port has wrongfully and without notice to complainant removed the earth from about one-half (½) of said waterway at the outer end thereof, at what is known as deep water, and extended thereon to said Garfield Street, and placed the same in said waterway at the inner end thereof at and beyond said bulkhead therein at said Garfield Street, raising the same above the line of extreme high tide, from and extending northerly in said waterway from said Garfield Street, which earth so transferred is a distance of at least one half (½) a mile and of an average of three-fourths (¾) of a mile, and in order to enable this complainant to perform the said contract, said
14 earth must be returned said distance for filling said adjacent lands at the outer or deep water end of said waterway, necessarily entailing an additional expense of at least five cents (5¢) per cubic yard for the excavation and further delivery in added cost of such required further delivery, said earth being the only earth available for the filling of the adjacent lands aforesaid, and complainant avers that there were at least one million five hundred thousand (1,500,000) cubic yards of earth so wrongfully removed, taken and deposited as aforesaid, necessarily entailing an added cost for its removal over and above what it would have cost this complainant of at least Seventy-five Thousand Dollars ($75,000).

XI.

Complainant is informed and states the facts to be that the defendant, Port of Seattle, by its said Commissioners, is now threatening to further obstruct and impede the rights of this complainant under said contract by making transfer and disposition by sale or lease, or both, of portions of said waterway, to persons and corporations, and especially to said defendant, Railway Company, by which complain-

ant will be prevented, if not wholly defeated in the performance of his said contract, to complainant's irreparable damage, unless defendants be restrained by order of this Honorable Court.

Complainant charges that said Act of March 11th, 1913, vacating said waterway and donating a portion thereof to the defendant, Port of Seattle, is a law of the State of Washington, and is violative of Sec. (10) Ten Article One (1) of the Constitution of the United States and of Article 14, Section I of the Amendments to the Constitution of the United States relating to the deprivation of life, liberty and property without due process of law, and of the due protection of the laws, and complainant is without any adequate remedy except in a court of equity.

15 XII.

That the amount in controversy herein exceeds Five Thousand Dollars ($5,000) exclusive of costs, for which grievances complainant has no speedy or adequate remedy at law.

Wherefore, The complainant presents this suit in equity and prays:

I.

That the Port of Seattle, a municipal corporation of the State of Washington; H. M. Chittenden, President, C. E. Remsburg and Robert Bridges, Commissioners of said Port of Seattle; W. V. Tanner, Attorney General of the State of Washington, and Seattle & Montana Railway Company, a corporation, Defendants, be summoned to appear and answer the premises but not upon oath or affirmation, the same being expressly waived, and to stand to and abide by such orders and decrees in the premises as the Court may from time to time enter.

II.

That a temporary or interlocutory injunction issue from this Court restraining and enjoining the Port of Seattle, a municipal corporation of the State of Washington, H. M. Chittenden, President, C. E. Remsburg and Robert Bridges, Commissioners of said Port of Seattle, W. V. Tanner, Attorney General of the State of Washington, and Seattle & Montana Railway Company, a corporation, its officers, agents and servants, Defendants, and each of them, from enforcing in any way or manner in Court or out of Court, the said Act of the Legislature of the State of Washington relating to the vacation of Smith's Cove Waterway in Seattle Harbor, King County Washington, and known as House Bill No. 478, approved March 11th, 1913; Also, from interferring in any manner with the rights of William F. Hays, the complainant, in his exclusive possession and control of the said Smith's Cove Waterway, and until the further order of the Court.

16

III.

That upon a final hearing of this cause, the said Act of the Legislature of the State of Washington, relating to said Smith's Cove Waterway, and known as House Bill 478, approved March 11th, 1913, be adjudged and decreed by this Court, unconstitutional and void, and that a perpetual injunction be granted by this Court forever restraining and enjoining the Defendants, Port of Seattle, a municipal corporation of the State of Washington, H. M. Chittenden, President, C. E. Remsburg and Robert Bridges, said Port Commissioners; W. V. Tanner, Attorney General of the State of Washington, and the Seattle and Montana Railway Company, a corporation, its officers, agents and servants and each of them, from the assertion of any right conferred by said Act whatsoever, and from enforcing in any manner, in Court or out of Court, said Act,—also from exercising any act or acts of ownership, power or authority over said Smith's Cove Waterway, or in any manner interferring with or tending to interfere with the rights of complainant in and to said waterway in pursuance of his said contract.

IV.

And for such other and further relief as in law and equity the complainant is entitled to in the premises.

THOS. M. VANCE,
W. F. HAYS,
Solicitors for Complainant.

WILLIAM F. HAYS,
Complainant.

STATE OF WASHINGTON,
County of King:

William F. Hays being duly sworn on oath deposes and says: That he is the complainant named in the foregoing Bill of Complaint; that he is familiar with and knows the contents thereof, and that the same is true to deponent's knowledge, except as to the matters therein stated to be upon information and belief of complainant, and as to those matters, he believes the same to be true.

WILLIAM F. HAYS.

Subscribed and sworn to before me this 14th day of November, 1914.

[SEAL.]

FLORENCE LEWIS,
Notary Public in and for the State of Washington, Residing at Seattle.

17 Indorsed: Bill in Equity. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 14, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy.

18 In the United States District Court for the Western District of Washington, Northern Division.

No. 47.

WILLIAM F. HAYS, Complainant,

vs.

PORT OF SEATTLE, a Municipal Corporation of the State of Washington; H. M. Chittenden, President; C. E. Remsburg and Robert Bridges, Commissioners of said Port of Seattle; W. V. Tanner, Attorney General of the State of Washington, and Seattle & Montana Railway Company, a Corporation, Defendants.

Show Cause Order.

To the Defendants and their Attorneys, Take Notice:

That an Order was entered by the above entitled Court at Chambers this 30th day of November, 1914, requiring you and each of you to appear before the said Court at 10 A. M. Monday, December 7th, to show cause, if any you have, why a temporary restraining order may not be entered in the above entitled cause.

You and each of you, will further take notice that the undersigned, W. F. Hays, was directed by said Court to serve the foregoing notice upon you at least five (5) days previous to said hearing. Govern yourselves accordingly.

W. F. HAYS,
Attorney for Complainant.

19 *Sheriff's Return of Personal Service.*

STATE OF WASHINGTON,
County of Thurston, ss:

Sheriff's Office.

I, Fred W. McCorkee, Sheriff of Thurston County, State of Washington, do hereby certify that I received the annexed Order on the 2d day of December, 1914, that on the 2d day of December, 1914, I duly served the same on W. V. Tanner, Attorney General of the State of Washington, he being defendant named therein, by delivering to and leaving with W. V. Tanner said defendant, personally, in said Thurston County, a copy of said Order.

Dated this 2d day of December, 1914.

FRED W. McCORKEE,
Sheriff of Thurston County, Washington,
By —— ——, *Deputy.*

Sheriff's Fee: Service .60.
Mileage .20.

Indorsed: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 3, 1914, Frank L. Crosby, Clerk. By E. M. L. Deputy.

20 In the United States District Court for the Western District of Washington, Northern Division.

No. 47.

WILLIAM F. HAYS, Complainant,

vs.

PORT OF SEATTLE, a Municipal Corporation of the State of Washington, H. M. Chittenden, President; C. E. Remsberg and Robert Bridges, Commissioners of said Port of Seattle; W. V. Tanner, Attorney General of the State of Washington, and Seattle & Montana Railway Company, a Corporation, Defendants.

The answer of the Port of Seattle, a municipal corporation of the state of Washington, H. M. Chittenden, president, and C. E. Remsberg and Robert Bridges, commissioners of said Port of Seattle, to the bill of complaint of William F. Hays, complainant;

These defendants, now and at all times herein saving to themselves all and all manner of benefit of exception or otherwise that can or may be taken or had to the many errors, uncertainties and imperfections in said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering say:

I.

These defendants respectively believe that the statements contained in paragraphs numbered I to III of the bill of complaint are true, except in the particular here mentioned, to-wit: they believe that there is no such corporation as the Seattle & Montana
21 Railway Company, named in said paragraph III, and they therefore deny each and every allegation made or contained in said paragraph III.

II.

These defendants respectively have no reason to doubt and therefore believe that a contract was entered into between the Commissioner of Public Lands of the state of Washington and the complainant and one Frank Shay, and that the contract was approved by the Governor of the state of Washington, and a bond given as alleged, which was approved, but they deny that any such contract was ever entered into with the state of Washington or with any officer of the state of Washington by the complainant or said Shay or by either of them, as alleged in paragraph IV of the bill; they

deny that the map referred to in said paragraph IV showed any tide and shore lands to be filled and raised above high tide; they deny that they or either of them have any knowledge or information sufficient to form a belief as to whether or not the interest of said Frank Shay in any contract with the state of Washington was ever transferred or assigned to the complainant; they also deny that they or either of them have any knowledge or information sufficient to form a belief as to whether or not the complainant is the owner and holder of any contract with the state of Washington; and they deny that complainant is entitled to enforce any rights, whether in law or in equity, against the defendants or either of them or the state of Washington on any account whatsoever.

III.

They deny each and every allegation made or contained in paragraph V of the bill of complaint.

IV.

They deny that they or either of them have any knowl-
22 edge or information as to the allegations or any of them contained in paragraph VI of the bill of complaint, and they therefore deny each and every allegation therein contained.

V.

They admit the allegations of paragraph VII, except that they deny that the lands included in any waterways were by any act of the legislature of the state of Washington referred to in said paragraph reserved from sale for the purpose alleged in said paragraph or for any purpose.

VI.

They admit that the state of Washington sold to divers persons, firms and corporations all of the tide lands located in Smith's Cove at their appraised value; they deny each and every allegation made or contained in paragraph VIII of the bill of complaint save such thereof as they have hereinbefore expressly admitted.

VII.

They admit that the Great Northern Railway Company is the owner of a considerable area of tide lands at Smith's Cove; they deny that any conspiracy has ever been entered into or exists between the port commissioners of the defendant the Port of Seattle or any of them and any railway company to defeat any contract or to relieve any railway company from any obligation, present or con-
23 tingent; they admit that the act referred to in paragraph IX of the complaint was passed by the legislature; they deny

each and every other allegation made or contained in paragraph IX of the bill of complaint.

VIII

They admit that the defendant Port of Seattle has never obtained the consent of the complainant to the vacation of any part of said waterway nor given complainant any notice whatever of any proposed vacation of said waterway or of the port's intention to occupy the same; they deny that the complainant is the owner of any subsisting contract in respect of said waterway or having relation thereto or the dredging thereof or the filling of tide lands; they admit that, since the passage of the act of the legislature, the said Port of Seattle has been engaged in works of harbor improvement, as it is authorized to do by virtue of the act of its creation, and that said improvement has involved the dredging of parts of said waterway and the disposition of the earth so dredged by placing the same in other portions of said waterway and upon adjacent tide lands; they deny that the Port of Seattle has done anything in relation thereto except as hereinabove stated, and deny that the doing of said work will impose any cost or expense whatever upon the complainant or does in any manner infringe any right of the complainant; they deny each and every other allegation made in paragraph X of the bill of complaint.

VIII.

They admit that the Port of Seattle, acting by its port commissioners, is negotiating to obtain the consent to the vacation
24 of the portion of said waterway described in said act of 1913, and is further negotiating, if such consent shall be obtained and the title to said portion of said waterway vested in the Port of Seattle pursuant to said act of the legislature, to exchange a certain portion of said waterway so vacated with the Great Northern Railway Company, corporation, for certain tide lands owned by said railway company adjacent to certain harbor improvements now being constructed by the Port of Seattle; they deny each and every allegation made in paragraph XI of the bill of complaint save such thereof as they have hereinbefore expressly admitted.

IX.

They deny each and every allegation made or contained in paragraph XII of the bill of complaint.

Wherefore, having denied all the material allegations of the bill of complaint, which denials they are ready and willing to aver, maintain and prove, as this honorable court shall direct, these de-

fendants humbly pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

THE PORT OF SEATTLE,
By H. M. CHITTENDEN, *President.*
H. M. CHITTENDEN.
C. E. REMSBERG.
ROBERT BRIDGES.

HAROLD PRESTON,
O. B. THORGRIMSON,
Attorneys for Said Defendants.

25 STATE OF WASHINGTON,
County of King, ss:

H. M. Chittenden, C. E. Remsberg and Robert Bridges, being first duly sworn, each for himself on oath says: that the said H. M. Chittenden is the president, and the said C. E. Remsberg and Robert Bridges commissioners, of the Port of Seattle, the defendant municipal corporation in the above entitled action, and make this affidavit in their own behalf and in behalf of said Port of Seattle; we have read the foregoing answer, know the contents thereof, and believe the same to be true.

H. M. CHITTENDEN.
C. E. REMSBERG.
ROBERT BRIDGES.

Sworn to before me and subscribed in my presence this 28th day of November, 1914.

[SEAL.] DEVILLO LEWIS,
Notary Public in and for the State of Washington Residing at Seattle.

Service of the within Answer delivery of a copy to the undersigned is hereby acknowledged this 4th day of December, 1914.

W. F. HAYS,
Attorney for Plaintiff.

Indorsed: Answer. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 4, 1914. Frank L. Crosby, by Ed. M. L., Deputy.

26 In the United States District Court for the Western District of Washington, Northern Division.

No. 47.

WILLIAM F. HAYS, Complainant,

vs.

PORT OF SEATTLE, a Municipal Corporation of the State of Washington; H. M. Chittenden, President; C. E. Remsburg and Robert Bridges, Commissioners of said Port of Seattle; W. V. Tanner, Attorney General of the State of Washington, and Seattle and Montana Railroad, Sued as Seattle & Montana Railway Company, a Corporation, Defendants.

Answer of Seattle and Montana Railroad Company.

Now comes the defendant Seattle and Montana Railroad Company, sued as Seattle & Montana Railway Company, a corporation, and for its separate answer to the complaint of the above named complainant herein respectfully states to the court and alleges:

I.

The defendant admits that the complainant is a citizen and resident of King County, in the State of Washington, over the age of twenty-one years, but denies any knowledge or information as to whether the plaintiff is a taxpayer in said county sufficient to enable the defendant to form a belief.

The defendant admits that the Port of Seattle is a municipal corporation created, organized and existing as alleged in Paragraph 2 of the complaint; and that the defendants Chittenden, Remsburg and Bridges are the duly elected and acting commissioners thereof; and that the defendant Tanner is the duly elected and acting Attorney General of the State of Washington.

The defendant admits that it is a corporation duly created and existing under the laws of the State of Washington, under the name of the Seattle and Montana Railroad Company.

27 The defendant admits the Legislature of the State of Washington duly enacted the Act of said Legislature set forth in Paragraph 9 of said complaint.

II.

The defendant expressly and specifically denies that it is now, or ever has been, known as the Great Northern Railway, that it is doing business for profit in the State of Washington or elsewhere, or that it is doing business of any kind or nature either in the State of Washington, or elsewhere, or that it maintains any offices in the City of Seattle, or elsewhere, for the transaction of any business of any kind

or nature other than meetings of stockholders and trustees of suc corporation.

The defendant expressly and specifically denies that it now own or, at any time during the said years immediately preceding th commencement of this action, did own, have or possess any of th lands, property or real estate mentioned or referred to in the com plaint; and the defendant specifically alleges that since the first da of July, 1907, it had not owned any of the lands referred to in th complaint, or any lands or property of any kind or nature in th City of Seattle, or in said County of King.

The defendant denies that it, or any of its officers, agents or em ployes or anyone on its behalf, in any manner sought, suggested in any manner requested or influenced the passing of said Act of th Legislature of the State of Washington; denies that it, or anyone o its behalf, had conspired, planned or negotiated with the said Po or its officers concerning the vacation of said Smith Cove Waterwa or the acquisition of any property on account thereof or in con nection therewith.

III.

The defendant alleges that it has no knowledge or informatio sufficient to enable it to form a belief as to whether the co
28 tract or contracts mentioned and referred to in Paragraph of said complaint were ever made, executed or delivered had any existence whatever; or as to the truth or falsity of any the allegations of said Paragraph 4; or as to whether the plaintiff any other person ever did or perform- any of the acts alleged i Paragraph 5 of the complaint.

The defendant alleges that it has no knowledge or informatio sufficient to enable it to form a belief as to the truth or falsity of an of the allegations of Paragraph- 6, 7, 8 and 10 of said complaint.

IV.

The defendant denies each and every other allegation in said com plaint contained not hereinbefore expressly admitted, qualified denied. The defendant expressly denies that the said Act of Legi lature hereinbefore referred to is violative of any property or pe sonal rights of plaintiff secured to him by the constitution of th United States, or otherwise, and denies that the said plaintiff ha any personal or property rights in and to the said waterway or an part or portion thereof.

Wherefore, defendant prays that said action be dismissed and tha it have judgment for its lawful costs and disbursements herein.

F. V. BROWN,
F. G. DORETY,
Attorneys for Defendant Seattle & Montana Railroad Company.

29 STATE OF WASHINGTON,
County of King, ss:

F. V. Brown being duly sworn, says: That he is the attorney for the Seattle and Montana Railroad Company one of the defendants in the within entitled action; that he knows the contents of the within answer and that he believes the same, and the whole thereof, to be true; that the said defendant Seattle and Montana Railroad Company is a corporation organized under the laws of the State of Washington; that no officer thereof resides or is within the State of Washington.

And further affiant saith not.

F. V. BROWN.

Subscribed and sworn to before me this 4th day of December, A. D. 1914.

[SEAL.] MILTON W. MOORE,
Notary Public in and for the State of Washington,
Residing at Seattle.

Indorsed: Answer of Seattle and Montana Railroad Company. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 4, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy.

30 In the United States District Court for the Western District of Washington, Northern Division.

No. 47.

WILLIAM F. HAYS, Complainant,

v.

PORT OF SEATTLE, a Municipal Corporation of the State of Washington; H. M. Chittenden, President; C. E. Remsburg and Robert Bridges, Commissioners of said Port of Seattle; W. V. Tanner, Attorney General of the State of Washington, and Seattle & Montana Railway Company, a Corporation, Defendants.

Motion to Dismiss.

Comes now W. V. Tanner, as attorney General of the state of Washington, one of the defendants herein named, and moves to dismiss the bill of complaint herein, for the reason and upon the grounds that, as appears upon the face thereof;

1. That said bill of complaint does not state facts sufficient to warrant this court in granting any relief to the plaintiff;

2. That the plaintiff has a plain, speedy and adequate remedy at law;

3. That this court has no jurisdiction over the person of this defendant or of the subject matter of this action.

W. V. TANNER,
Solicitor for the Defendants.

Service of the foregoing Motion by receipt of copy thereof, admitted this 24th day of Dec., 1914.

W. F. HAYS,
Solicitor for Complainant.

Indorsed: Motion to Dismiss. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 24, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy.

31 United States District Court, Western District of Washington, Northern Division.

No. 47.

WILLIAM F. HAYS, Complainant,

vs.

PORT OF SEATTLE, a Municipal Corporation of the State of Washington et al., Defendants.

Order.

Now on application of complainant for an order dismissing this action as to W. V. Tanner, one of the defendants herein, and it appearing to the Court that no affirmative relief is sought against said defendant, and the defendant has filed no answer asking any affirmative relief;

It is therefore now ordered That said cause be dismissed as to the said defendant, W. V. Tanner.

Done in open Court this 28th day of December, 1914.

JEREMIAH NETERER, *Judge.*

Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 28, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy.

32 In the United States District Court for the Western District of Washington, Northern Division.

No. 47.

WILLIAM F. HAYS, Complainant,

vs.

PORT OF SEATTLE, a Municipal Corporation of the State of Washington; H. M. Chittenden, President; C. E. Remsberg, and Robert Bridges, Commissioners of said Port of Seattle; W. V. Tanner, Attorney General of the State of Washington, and Seattle & Montana Railway Company, a Corporation, Defendants.

Decree.

This cause having come on for trial on the 22nd day of April, 1915, plaintiff being represented by his attorney Will H. Thompson, and the defendant Port of Seattle being represented by its attorneys Messrs. France & Helsell, and evidence having been introduced and it appearing to the Court from the evidence that the complainant lost all rights which he may have had under the contract between himself and the State of Washington for the excavation of the Smith's Cove Waterway by reason of the fact that plaintiff was directed between the years 1896 and 1899 by various land commissioners of the State of Washington, to change the form of bulkhead specified in the original contract, and it appearing that it was the duty of the plaintiff to prepare and tender specifications covering the changed form of bulkhead as directed by the various land commissioners of the State of Washington and that complainant
33 neglected and refused to furnish plans and specifications pursuant to such direction, and it appearing that by reason of such failure on the part of complainant, he forfeited and lost all rights which he may have had under the contract between himself and the State of Washington, and that plaintiff further has lost all rights under said contract by reason of his laches in the assertion of any rights which he may have had thereunder, and the act in issue did not violate any constitutional rights of the plaintiff.

Now therefore, it is ordered, adjudged and decreed that complainant's bill be and the same hereby is dismissed with prejudice and that the defendant Port of Seattle have and recover its costs and disbursements herein incurred to be taxed. To the entry of this decree plaintiff excepts and exception is noted.

Done in open Court this 28 day of September, 1915.

JEREMIAH NETERER, *Judge.*

Copy os within Decree received and due service of same acknowledged this 21st day of September, 1915.

WILL H. THOMPSON,
W. F. HAYS,
Attorneys for Complainant.

Indorsed: Decree. Filed in the U. S. District Court, Western District of Washington, Northern Division, Sep. 28, 1915. Frank L. Crosby, Clerk. By E. M. L. Deputy.

34 In the United States District Court for the Western District of Washington, Northern Division.

No. 47-E.

WILLIAM F. HAYS, Appellant,

vs.

PORT OF SEATTLE, a Municipal Corporation of the State of Washington; H. M. Chittenden, President; C. E. Remsburg and Robert Bridges, Commissioners of Said Port of Seattle; W. V. Tanner, Attorney General of the State of Washington, and Seattle & Montana Railway Company, a Corporation, Respondents.

Assignment of Errors.

Comes now the petitioning appellant, and files the following assignment of errors on which he will rely in the prosecution of his appeal in the above entitled cause to the Supreme Court of the United States from the District Court of the Western District of Washington, Northern Division:

I.

The court erred in holding that the complainant, appellant in error, was directed between the years 1896 and 1899 by various land commissioners of the State of Washington, to change the form of the bulkhead specified in the original contract.

II.

The court erred in holding that it was the duty of complainant, appellant in error, to prepare and tender specifications covering the "changed" form of bulkhead as directed by the various land commissioners of the State of Washington.

35 III.

The court erred in holding that complainant, appellant in error, neglected and refused to furnish plans and specifications pursuant to such direction.

IV.

The court erred in holding that complainant, appellant in error, had forfeited and lost all rights which he had under the contract between himself and the State of Washington.

V.

The court erred in holding that complainant, appellant in error, had lost all rights under said contract by reason of his laches.

VI.

The court erred in holding that complainant, appellant in error, was guilty of laches in failing to assert his rights, if any he had, under said contract.

VII.

The court erred in holding that the act in issue and set out in appellant's bill in haec verba, did not violate any constitutional right of the complainant, appellant in error.

VIII.

The court erred in dismissing the bill of complainant, appellant in error, with prejudice, and erred in entering judgment in favor of the defendant, Port of Seattle, respondent herein, for its costs and disbursements in said action.

IX.

The court erred in dismissing the bill of complainant, appellant in error, upon motion of the State of Washington, by its Attorney General.

36

X.

The court erred in dismissing the bill of complainant, appellant in error, as against the defendant, respondent in error, Seattle & Montana Railway Company.

XI.

The court erred in holding in effect that the contract of complainant with the state was self forfeiting and void.

XII.

The court erred in holding, in this collateral proceeding, that the contract was "forfeited" because complainant did not furnish further and different "plans and specifications", from those contained in the contract, as suggested in the Bridges letter dated November 30, 1896.

XIII.

The court erred in finding in this collateral proceeding that complainant's contract was forfeited, under the Bridges letter in 1896,

contrary to and in disregard of the decision of the Supreme Court of the State of Washington, rendered January 9, 1901, Hays v. Hill, et al., reported in 23 Wash. p. 741; long after Bridges had gone out of office, and more than five years after the Bridges letter, therein holding a direct attack upon said contract, that "the contract in the meantime is in a state of suspension".

XIV.

The court erred in not holding, that House Bill No. 478, State of Washington, approved March 11, 1913, being an "Act, vacating a portion of Smith's Cove Waterway in the City of Seattle, and vesting the title of the vacated portion in the Port of Seattle", is the taking of complainant's property without due process of law, and is violative of Article XIV, Section 1 of the Amendments to the Constitution of the United States, and that complainant is without any remedy except in a Court of Equity.

37

XV.

The Court erred in holding that House Bill No. 478, State of Washington, approved March 11, 1913, being an "Act vacating a portion of Smith's Cove Waterway in the City of Seattle, and vesting the title of the vacated portion in the Port of Seattle" is not the taking of complainant's property without due process of law, and is not violative of Article XIV, Section 1 of the Amendments to the Constitution of the United States, and that complainant is not without any remedy except in a Court of Equity.

XVI.

The court erred in not granting the relief demanded in complainant's bill and in not entering judgment for complainant therefor.

Wherefore, the said petitioner prays that the decree and judgment of the said trial court be reversed, and that the said District Court of the United States for the Western District of Washington, Northern Division, be directed to enter judgment in favor of complainant, appellant in error, for the relief prayed for in his bill, and that said act of the legislature therein referred to, be decreed to be in effect, the taking of complainant's property, without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and that said lower District Court be directed to enter therein its judgment in accordance with justice and law.

WILL H. THOMPSON,
WILLIAM F. HAYS,
Solicitors for Complainant,
Appellant in Error.

38 Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, April 2, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 47.

WILLIAM F. HAYS, Appellant,

vs.

ORT OF SEATTLE, a Municipal Corporation of the State of Washington; H. M. Chittenden, President; C. E. Remsburg, and Robert Bridges, Commissioners of said Port of Seattle; W. V. Tanner, Attorney General of the State of Washington, and Seattle & Montana Railway Company, a Corporation, Respondents.

Petition for Appeal to the Supreme Court.

the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, William F. Hays, appellant in the above entitled use, would respectfully represent and show that in the above enled cause pending in the United States District Court for the West- District of Washington, Northern Division, there was entered on ptember 28, 1915, a final decree greatly to the prejudice and inry of your petitioner, which said decree is erroneous and inequible in many particulars.

Wherefore, in order that your petitioner may obtain relief in the emises, and have opportunity to show the errors complained of, ur petitioner prays that he may be allowed an appeal in said cause this Honorable Court and that the proper orders touching the urity required of him may be made.

WILL H. THOMPSON,
WILLIAM F. HAYS,
Solicitors for Complainant, Appellant in Error.

Indorsed: Petition for Appeal to the Supreme Court. Filed in U. S. District Court. Western Dist. of Washington, Northern vision, Apr. 2, 1917. Frank L. Crosby, Clerk, by Ed M. Lakin, puty.

40 In the United States District Court for the Western District of Washington, Northern Division.

No. 47-E.

WILLIAM F. HAYS, Appellant,

vs.

PORT OF SEATTLE, a Municipal Corporation of the State of Washington; H. M. Chittenden, President; C. E. Remsburg and Robert Bridges, Commissioners of said Port of Seattle; W. V. Tanner, Attorney General of the State of Washington, and Seattle & Montana Railway Company, a Corporation, Respondents.

Order Allowing Appeal.

This matter coming on this 30th day of March, 1917, on the petition for appeal to the Supreme Court, it is

Ordered, adjudged and decreed that the petitioning appellant in error is hereby granted permission to appeal to the Supreme Court of the United States.

Done in open court this 30th day of March, 1917.

JEREMIAH NETERER, *Judge.*

Amount of Bond for Costs on Appeal is hereby fixed at $500.00.

JEREMIAH NETERER, *Judge.*

Indorsed: Order Allowing Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division April 2, 1917. Frank L. Crosby, Clerk, by Ed M. Lakin, Deputy.

40*a* In the Supreme Court of the United States.

No. 47-E.

WILLIAM F. HAYS, Appellant,

vs.

PORT OF SEATTLE, a Municipal Corporation of the State of Washington; H. M. Chittenden, President; C. E. Remsberg and Robert Bridges, Commissioners of said Port of Seattle; W. V. Tanner, Attorney General of the State of Washington, and Seattle and Montana Railway Company, a Corporation, Respondents.

Bond on Appeal.

Know all men by these presents, That we, William F. Hays, as principal, and D. B. Bardell, as surety, are held and firmly bound unto the Port of Seattle, a Municipal corporation of the State of Washington, W. V. Tanner, as Attorney General of the State of

Washington, and Seattle and Montana Railway Company, a Corporation, respondents, in the sum of Five Hundred Dollars ($500.00), to be paid to the said named respondents, to which payment, well and truly to be made, we bind ourselves jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 12th day of March, 1918.

Whereas, the above named appellant in error, seeks to prosecute his appeal to the Supreme Court to reverse the judgment rendered in the above entitled action by the United States District Court for the Western District of Washington, Northern Division,

Now, therefore, the condition of this obligation is such that if the above named appellant in error, shall prosecute his said appeal and answer all costs that may be adjudged if he shall fail to make good his appeal, then this obligation to be void, otherwise to remain in full force and effect.

WILLIAM F. HAYS.
D. B. BARDELL.

STATE OF WASHINGTON,
County of King, ss:

D. B. Bardell, being duly sworn on oath, deposes and says: I am of lawful age, and am a citizen of the State of Washington, and know the contents of the foregoing instrument, to which I have attached my name; that I am worth, in property within this state, the sum of Five Hundred Dollars ($500.00) over and above all debts, liabilities and exemptions.

[SEAL.] D. B. BARDELL.

Subscribed and sworn to before me, this twelfth day of March, 1918.

LOUIS T. SILVAIN,
Notary Public in and for the State of Washington, Residing at Seattle.

Bond approved, dated March 13, 1918.
JEREMIAH NETERER,
Judge of the United States District Court for the Western District of Washington, Northern Division.

Receipt of copy of Appeal Bond and service hereof admitted this 12th day of March, 1918.

MR. C. J. FRANCE,
Attorney for Port of Seattle.

Indorsed: Bond on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 12, 1918. Frank L. Crosby, Clerk, by Ed. M. Lakin, Deputy.

41 No. 47.

W. F. HAYS

vs.

THE PORT OF SEATTLE et al.

42 *Index.*

Plaintiff's Case.

	Page.
Hays, W. F.:	
Direct	3
Cross	16
Redirect	37
Recross	62
Recalled:	
Direct	81
Recalled:	
Further Cross	166
Redirect	169
Recalled:	
Direct	182
Hunter, Frank T.:	
Direct	66
Hamlin, P. D.:	
Direct	71
Cross	74
Recalled:	
Direct	176
Whitham, Paul P.:	
Direct	76

Defendants' Case.

	Pa
Adams, Elmer E.:	
Direct	1
Cross	1
Bridges, Robert	
Direct	1
Cross	1
Recalled:	
Direct	1
Cross	1
Cryderman, J. J.:	
Direct	
Cross	
Recalled:	
Direct	1
Cross	1
Forrest, W. T.:	
Direct	1
Cross	1
Gillis, A. H.:	
Direct	
Cross	
Direct	1
Cross	1
Preston, Harold:	
Shoemaker, John E.:	
Direct	1
Cross	1
Tamblin, Maud S.:	
Direct	
Cross	
Recalled:	
Direct	1
Cross	1

Index.

Defendants' Case.—*Cont'd.*

Page.

West, J. R.:
Direct 138
Cross 142
Redirect 145

Recalled:
Direct 153
Cross 154
Redirect 162

43 *Index.*

Plaintiff's Case.

Exhibits.

Page.

"1" 5
"2" 6
"3" 7
"4" 11
"5" .....
"6" and "7" 41
"8" and "9" 44
"10" and "11" 45
"12" 52
"13" and "14" 53
"15" and "16" 54
"17," "18" and "19" 55
"20" 57
"21" 59
"22" 67
"23" 68
"24" and "25" 69
"26" and "27" 71
"28," "29" and "30" 72
"31" 159

Defendants' Case.

Exhibits.

Page.

"A" 19
"B" 85
"C" 85
"D" 85
"E" 85
"F" 85
"G" 86
"H" 86
"I" 86
"J" 86
"K" 87
"L" .....
"M" .....
"N" 150
"O" 150

44 In the United States District Court, District of Washington, Northern Division.

No. 47.

W. F. HAYS, Plaintiff,

vs.

THE PORT OF SEATTLE et al., Defendants.

This cause coming on regularly for hearing on this Friday, April 23, 1915, at the hour of ten o'clock A. M., before the Honorable Jeremiah Neterer, Judge, the Plaintiff appearing in person and by his attorney, Will H. Thompson, Esq., and the defendants appearing by their attorneys, C. J. France, Esq., and Frederic G. Dorety, Esq., the following proceedings were had and testimony taken, to wit:

45 W. F. HAYS, Plaintiff, produced as a witness on his own behalf, being first duly sworn, testified as follows:

(Mr. Thompson:)

Q. Your name is William F. Hays?
A. Yes.
Q. You are the complainant in this case?
A. I am.
Q. Mr. Hays, what was the first step, if any, taken by you with reference to obtaining the contract that is referred to in your complaint for the filling of the lands or the water at Smith's Cove?
A. I, together with one Frank Shea of San Francisco, prepared an application proposing to do the work as required by law, and filed the same with the Commissioner of Public Lands, who was then Mr. W. T. Forrest.
Q. The Commissioner of Public Lands of the State of Washington?
A. Of the State of Washington.
Q. You may state whether that was acted on, and, if so, what paper you received, if any, and the result therefrom.

Mr. France: I object to that. I think the original application itself is the best evidence.

The Court: He may state what was done, and what, if anything, resulted.

Mr. Thompson: It developed into the contract which he recites.

The Witness: I have a certified copy here of the original application, if it is desirable.

Q. Refer to it.

46 A. The original contract which followed this application was first approved by the Honorable W. T. Forrest as such Land Commissioner of the State of Washington, and the law provided

at the Governor should also approve the same, which action was ferred for some time; protests having been filed, and on the ength of which hearings were ordered by the Governor to hear se objections and to inform himself as to all the facts and matters ident to the proposed improvement, and finally the Governor uired a sort of a supplement or modification of the contract as tered into, requiring the contractors to cut across what is known the neck of land between Salmon Bay and Smith's Cove, a strip of d lying between the two bodies of water and supposable connect- what was then the contemplated government canal which was ended to connect the waters of Puget Sound and Lake Washing-

Q. Now, to make a long story short, because we will come to these ails later, what instrument of any kind was executed between you d the state with reference to both the original and the modification, ny?

A. With this modification added, the Governor of the State of shington approved the contract under his seal of office, and which ow hold in my hand, certified to as such by the Commissioner of blic Lands, G. W. Ross, former commissioner, and including in certificate copies of other instruments which were filed in connec- n with this contract.

Mr. France: If Your Honor please, I want to renew the objection which I made a few minutes ago, that this contract is irrelevant, immaterial and incompetent, and it is improper to introduce the contract until Mr. Hays introduces the application, notice and the affidavit as required by statute, to which he re- red in his preliminary testimony, and upon which this contract st be based.

Mr. Thompson: This has not been offered yet.

The Court: Let it be marked for identification in the record.

Mr. Thompson: I will simply identify it and introduce step by such instruments as we have, providing the court admits them the time.

Mr. France: I want to make my objection clear in the record.

The Court: Let the Clerk mark it for identification.

Mr. Thompson: The instrument which you have identified——

Mr. Hays: —as being the contract and the modification, I now ask have identified as plaintiff's exhibit.

The Court: Will there be ma-y exhibits?

Mr. Thompson: There will be several, Your Honor.

The Court: Let it be marked as identified exhibit number "1."

(Document marked as above.)

Mr. Hays, after the instrument, plaintiff's exhibit number for identification, was executed, what steps, if any, did you take arry out your part of the provisions of that instrument?

. This contract—I was required by the Commissioner of Public ds to execute a bond in the sum of $25,000, which was done, approved by the Commissioner and filed in his office.

48 Q. After that what was the next step you took towa carrying out that contract?

A. The next step was to begin the work in pursuance of that c tract and within the time limits provided in that contract.

Q. You have alleged in your bill that at a certain time Frank Shea, who was jointly interested with you in that contr assigned his interest to you; was this work begun before or a that date?

A. After his assigning his interest in that contract.

Q. What can you show to the court, if anything——

Mr. France: I desire to object to any statement about the assi ing of this alleged contract.

Mr. Thompson: I was just going to identify it and I will introd it in evidence later.

Q. What steps did Mr. Shea take, if any, with reference to assi ing that instrument to you?

A. He executed a written assignment to me.

Q. Have you that instrument?

A. I have. The assignment is made a part of the certificate h in this contract itself, and that is of record.

(Here the witness leaves the stand to search for the assignme among his papers.)

Mr. Thompson: While Mr. Hays is looking for that, I will int duce a certified copy of the application which was referred to.

The Court: Let it be marked for identification as exhibit "

(Document marked as above.)

49 Mr. Thompson: I think we will not delay the proceedings the court at this time to try to find that, Mr. Hays.

The Witness: I know I have it, Your Honor.

Mr. Thompson: There is also a copy of it contained in the pap which have been certified and introduced in evidence—there is copy of it contained within those, but at the same time we will p duce the original.

I will also introduce, as our exhibit number "3," a power of torney from Frank Shea to Mr. Hays to proceed with all this work that power of attorney is set forth also—a copy of it, in the rec that we introduced in evidence.

I think, Mr. Hays, you can take the stand.

The Witness: I may have left it in my desk, but I think it is the files here—I will produce it though.

Q. Proceeding Mr. Hays, I asked you after this assignment by M Shea to you, that we will produce, I will ask you to state what furth steps you took to carry out the contract?

A. As I before stated, I proceeded to do the work under the c tract.

Q. In what way?

A. By employing a sub-contractor to perform a certain portion of the work, who proceeded to purchase piles and material, as required for the building and construction of the bulkhead.

Q. What engineer or expert did you have in charge, if any?

A. I had Mr. P. D. Hamlin.

Q. Is Mr. Hamlin in Court?

A. He is here.

Q. What, if anything, did Mr. Hamlin do under that
50 arrangement?

A. Mr. Hamlin in fact had been my engineer from an earlier date—he became engineer at the time of the making of the contract, and he drew the plans and specifications and maps and provided all of the preliminary work to the performance—under the making of the contract—and later on, to its performance.

Q. Were those plans and specifications that he drew the originals ones that were filed with the Land Commissioner?

A. They are.

Q. Now what was actually done by your sub-contractor and Mr. Hamlin under your contract, towards carrying it out—what was the actual work done?

A. I employed a man by the name of Leine—Leine & Wright was the firm, who were to build and construct a certain amount of bulkheading, and they obtained their material, piles and brush, preliminary to the work, and started in by pile-driving, or driving piles, under the direction and personal supervision of Mr. Hamlin. I gave notice of the intention and purpose to begin the work, to the Commissioner of Public Lands, Mr. Forrest.

Q. At what time, if at any time, after that were you stopped, and by what authority, if at all?

A. Mr. Forrest——

Q. When you speak of Mr. Forrest, what was his position?

A. Commissioner of Public Lands, notified me by wire, as I recall, to meet his engineer, Mr. Gillis, and Mr. Gillis——

Mr. France: I think that if he has the paper of notification, it is the best evidence.

Mr. Thompson: Have you that original wire?

51 A. I was not able to lay my hand on it. I have seen it, but I do not know where it is now.

Q. After receiving the wire, what did you do?

A. After receiving the wire, Mr. Forrest notified me to desist.

Q. How did he notify you?

A. Either through Mr. Gillis or personally—his engineer—Gillis was his engineer—the state engineer.

Q. You say he notified you to have a meeting—did you or did you not have a meeting with them?

A. I met with them and was informed that it was necessary to make a different character and style of bulkhead.

Q. Who informed you of that at that meeting?

A. Mr. Forrest—I am not sure whether it was Mr. Forrest personally or whether it was his engineer, Gillis, but it was later on dis-

cussed between Mr. Forrest and myself, and some correspondence pursuant to that had been, or was later on had between us.

Q. What did Mr. Forrest and Mr. Gillis, his engineer, tell you with reference to continuing or stopping that work?

A. He said, "Stop the work."

Q. For what reason?

A. In order to provide, or to determine rather, what kind of a change was desirable to be made in the bulkhead.

Q. Did you or did you not then desist?

A. I did—the work was stopped.

Q. What change was afterwards made by Mr. Forrest or any subsequent commissioner, with reference to bulkhead?

A. Mr. Forrest requested me to get the opinions of engineers if I could of national reputation, to determine what would
52 be, in their opinion, the character of bulkhead desirable for that particular locality, and I went about endeavoring to do this and I continued it for a few weeks. I got the report of Colonel D. W. DeCoursey, who was a very prominent, capable engineer; Mr. Brown, and General Will S. Smith of New York and Chicago, and filed those letters with Mr. Forrest.

Q. Officially, in his office?

A. Yes, and Mr. Forrest then wrote me a letter.

Q. Have you that letter?

A. I have.

Q. I wish you would produce it, Mr. Hays—wherever you have one of the letters which was written, produce it.

A. This letter is also published—it was published by Mr. Robert Bridges——

Q. By whom?

A. Robert Bridges, Commissioner of Public Lands of the state in his annual report for 1898, and it is found in that report on page 77 in the letter addressed to myself, of date November 30, 1896.

Q. Have you got the original there?

A. I have it somewhere—I have them a little mixed, but I can lay my hand on it.

Mr. Thompson: I think this to be entirely competent; it is published by authority of the state and by the Commissioner.

The Court: Is there any objection?

Mr. France: I would want to check it up with the original copy on file.

Mr. Thompson: We have no objection to that.

53 The Witness: I think at the same time there are other letters there which might be introduced, in the book.

Mr. Thompson: We will offer this at this time, or at least have it identified.

The Witness: I have the original somewhere among my files here.

Mr. France: There is a copy of it here if you wish to introduce it.

Mr. Thompson: I will ask to have that identified.

The Court: Let it be marked for identification as number "4."

(Document marked as above.)

(Mr. Thompson:)

Q. After receiving exhibit number "4," which you have identified, what further took place with reference to any attempt on your part to proceed with the work or obtain the form of bulkhead?

A. I called upon Commissioner—what's his name—the successor of Mr. Forrest—and talked about it several times.

Q. Lawrence or Bridges?

A. Bridges.

Q. Just state to the Court what took place?

A. I talked with them concerning the changes in the bulkhead. Mr. Bridges notified me on one occasion to appear before them and show cause why the contract should not be cancelled, having gone beyond the time-limit in which it should have been performed. I appeared before the Governor, the Attorney General and the Commissioner. At that hearing, after the hearing was over, it was stated in open meeting that I had done everything that I
54 could do—that could be done by the contractor in the matter, and was no wise in default; that the state was in default, but the conditions were such then that they could not formulate then a permanent plan of bulkheading, on account of this government canal—the government canal might require a different form of retaining wall from that which the state wanted and it was understood as a part of this contract that the government of the United States was to be considered in making that improvement, and that the change that was imposed upon the contract by Governor McGraw——

Q. That was the reason then why they could not get it formulated?

A. Yes. Mr. Bridges then corresponded with Secretary Alger, to know if they could not make some plan. Mr. Alger said they were not at that time prepared to do so, and so his published report shows.

Q. Now Mr. Hays, in order to hasten the time——

A. (Continuing:) I then followed it up, asking from time to time his successor, Judge Clavert—I had a great deal of correspondence with Judge Calvert—and at one time he concluded he was going to formulate a plan anyway and disregard the government, but he refused to do so unless I would consent to waive the question which was imposed upon the contract, namely the cutting across of the neck of land between Salmon Bay and Smith's Cove, and of course, I could not do that, and Mr. Calver had no power to authorize it—it was a binding obligation and it became a stated requirement which could not be changed by Mr. Calvert or myself by agreement.

55 Q. Now, what I want to get at is simply the fact then that for reasons best know- to himself, he did not furnish any plans or specifications?

A. He did not; neither did his successor, Mr. Ross, with whom I had many conversations concerning it, and about the delays incident to the work, and finally I took up the matter of endeavoring to

get the government canal to move, and through Mr. James Moore I was enabled to make a contract with Mr. Moore, who agreed to excavate a part of the earth from the government canal, and assist in the filling of that portion which the earth of the waterway would not be ample or sufficient to complete, at a consideration, and through that Mr. Moore went to Washington and obtained a special act of Congress on the strength of being able to save in the neighborhood of a half a million dollars in the excavation work of the canal by means of being paid for the filling at Smith's Cove—he was willing to undertake to dig that canal, and through that he got the act of Congress passed which gave him the right to dig that canal.

Q. Now, coming down to the point that I was trying to get at——

Mr. France: I was not in a position to interrupt the witness, but I move that all this be stricken out about what Mr. Moore did or what he was able to do.

The Court: I will consider it whether it is material—I will determine that later.

Mr. France: The existence of the law itself will be taken as the best evidence of that, no doubt.

(Mr. Thompson:)

Q. What I was trying to get at is: Has the state or the
56 Land Commissioner or any public authority of the State of Washington ever furnished you with the specifications for the bulkhead?

A. They never have, and they never have furnished me that right-of-way across the neck of land between Salmon Bay and Smith's Cove, which was made a condition precedent to the performance of that contract.

Q. I will ask you to state whether you had, before the beginning of this action, demanded that of the Land Commissioner and of the state authorities?

A. I did, at various times.

Mr. France: I will ask you to state whether that demand was in writing, or not?

Mr. Thompson: I do not know whether that demand was in writing or not—do you know whether that was in writing?

The Witness: Yes, I made the demand in writing.

Q. I wish you would refer to it—but just before bringing this action—before that, state whether you made any demand before this last one preceding the bringing of this action?

A. Yes, very frequently—I ver- frequently spoke and talked with——

Mr. France: I object—he states that the various demands were in writing.

The Court: The objection is sustained.

The Witness (continuing): I made a specific demand on each

and every commissioner; but I realized as well as they did, the situation of this government canal. It was public notoriety—everyone know that that government canal was a part of the proj-
57 ect and it had to be worked together.

Q. The contract shows that situation—what I am trying to get at is, if you made any written demand and have any copy of that?

A. Yes, I have a copy of the written demand that was served upon Mr. Savidge, the present Land Commissioner, sometime before the bringing of this action. It is among my papers here, but I cannot lay my hand on it.

Q. I will ask you to pay attention to the questions that I am asking you, so that we will save a lot of time—what authority of the state or of the Land Commissioner or of the Land Commissioner's office or any authority of the state, has furnished you any plans or specifications for these bulkheads?

A. None. There has been no plan ever furnished and no offer of any plan been furnished by anyone connected with the State Land Commission's office or outside of it.

Q. That is all that I desire on that point, Mr. Hays.

A. (Continuing:) And from the very first to the present hour I have stood ready to perform this contract in every detail.

Q. I will ask you to state what demand or request has ever been made upon you by the Land Commissioner, by any authority under him, or by the state or any of its authority, to proceed with the work upon that contract?

A. None whatsoever, excepting as I indicated to you with reference to Mr. Bridges during his term of office when he caused a meeting to be held to discuss the situation and to endeavor to get action under the contract.

Q. That is the meeting which you detailed to the court?

58 A. Yes.

Q. We now desire to identify the parties to the case of "Hays against Hill" in the 23rd Washington, I forget the page—I will ask you to state, Mr. Hays, if you know of that case reported in the 23rd Washington?

A. Yes, sir.

Q. Are you the same Hays that brought that suit?

A. Yes, sir.

Q. Who was the Hill?

A. James J. Hill, the president of the Great Northern Railroad.

Q. Was the Great Northern also a party to that?

A. It was.

Q. That case was brought in the Superior Court of the state of Washington?

A. Yes, sir.

Q. And appealed to the Supreme Court of the state of Washington?

A. It was.

Q. And the final decision of the Supreme Court in your case, is that case that I refer to?

A. Yes.

Mr. Thompson: I do not recall now, Your Honor, any other allegations of the bill that are traversed, and I will at this time submit the witness to counsel on the other side. If I find there is any other traversed——

Cross-examination.

(Mr. France:)

59 Q. How long did you work on this waterway, Mr. Hays?

A. Well, my men, I think, were probably about two days—I don't think more than that.

Q. About two days?

A. I think so.

Q. What two days were those?

A. Those were, I think, the 3rd and 4th of May, 1896.

Q. When you say your men were there, who do you mean?

A. I mean my chief engineer, Mr. Hamlin; I mean the sub-contractor, Mr. Leine and Mr. Wright.

Q. Were you there during that time?

A. Part of the time.

Q. What day were you there?

A. I was there on the 4th of May—I was there on both days in fact.

Q. You were there on the 3rd and the 4th day of May?

A. Yes, sir.

Q. And what did they do on the 3rd day of May?

A. Preparing their pile-drivers and their piles; getting them in shape and in position for driving, and under the instructions of the engineer as to where to place them with reference to the contract and its plans and specifications.

Q. Were there any piles driven then on the 3d of May?

A. I could not say positively whether there was—whether they drove piles that day or not—I think so, but I am not sure.

Q. Were any piles driven on the 4th of May?

A. Yes.

Q. How many piles were driven on the 3d of May?

A. I could not say as to that. I would say they must have

60 driven eight or ten piles in all—that was all they did drive.

Q. In all?

A. That is my recollection.

Q. How many men did they have working there?

A. I could not say exactly; I should say as many as a half a dozen, maybe more.

Q. When did you receive notice to desist from the work?

A. I received it on the 4th of May.

Q. You received it on the 4th of May?

A. On the 4th of May.

Q. Are you quite sure that it was not the 12th of May that you received that notice?

A. Yes, it was not the 12th. It was the 4th—the 4th of May. The way I happened to know that, I have had occasion to discuss it recently and I looked for the letter and the map—the memorandum that was made from the map on the day, and I think that I had a picture of the work as it began—I don't know what I did with it—that was scrolled on the map by the artist—or on the picture "Work begun on Smith's Cove May 4".

Q. Now you say you had a meeting at the Butler Hotel with Mr. Forrest at some time or other?

A. Well, I think it was at the Rainier Grand—I think it was the Rainier Grand.

Q. When was that?

A. That was, I think, on the 12th of May, or some time about that time.

Q. How did that meeting happen to take place?

A. That was by reason of a telegram from Mr. Forrest; Mr.
61 Forrest wired me to meet Mr. Gillis at the Rainier Grand Hotel.

Q. And you did not meet Mr. Forrest at that time?

A. I don't think Mr. Forrest was there.

Q. You do not recall, then, having a conversation or meeting with Mr. Forrest on or about May 12th?

A. No, I do not—I do not.

Q. Refreshing your recollection, I show you this letter under date of June 9, 1896, from W. T. Forrest to yourself. (Showing document to witness).

A. Yes, I have that letter.

Mr. France: I will offer this as defendant's exhibit "A". (Document marked as above).

Q. Now it appears from that letter that you, on or about May 12, had a meeting with Mr. Forrest in the Butler Hotel in Seattle?

A. I see.

Q. Doesn't it—I say, it would appear from this letter that you did have a conversation with Mr. Forrest on or about May 12, in the Butler Hotel?

A. Well, I think so, yes, we had a conversation at the Butler along about May 12.

Q. In that letter Mr. Forrest says "In that conversation (referring to the conversation of May 12) I told you that Mr. Gillis, engineer for this department, had reported to me that nothing less substantial than a stone bulkhead would answer the purpose in the improvement of Smith's Cove waterway contemplated by you"?

A. He made that statement, yes.

Q. Now then, are you not mistaken, in view of what is said in that letter, regarding the time you were first notified that a
62 stone bulkhead would be required?

A. I did not mean to make any statement concerning that at all. I know that after the work had been stopped by Mr. Forrest some time; possibly a month or more, Mr. Forrest one day in the Butler Hotel told me that he did not know but what a stone bulk-

head would be required. I pointed out to him that that was vio
tive of the contract; that he could not require such a thing; that
had the power to change the character of the bulkhead, but he co
not make it steel or iron or stone.

Q. And you, at all subsequent times, refused to make a stone bul
head, did you not?

A. I made no refusal at all. He never offered me any plans
any kind; he never submitted any proposition to me except in
sort of desultory conversation—no official act of his, as I ever und
stood, concerning the matter.

Q. But you did state to Mr. Forrest that requiring you to ma
a stone bulkhead would be in violation of the contract?

A. Yes.

Q. Which is tantamount to saying that you would not do it,
it not?

A. Well, you can construe that as you will. I certainly wou
have had the courts pass on that question if it had ever been su
mitted to me.

Q. And you at that time substantially refused to construct a sto
bulkhead as required by Mr. Forrest, did you not?

A. No; I treated the subject lightly, for I did not think he w
serious about it. Later on Mr. Forrest wrote me, after I had su
mitted the report of the engineers of national reputatio
63 such as General Will S. Smith and D. W. DeCoursey, sho
ing that a brush bulkhead was the most substantial of
even more so than stone. Then Mr. Forrest wrote me the letter
which I have referred, saying that he had been advised about t
government canal requirements, and that owing to that he wou
postpone entirely the further consideration of the adoption of a
plan of bulkhead.

Q. Subsequently did not Mr. Bridges reach exactly the same po
tion with you that Mr. Forrest took, that the stone bulkhead wou
have to be built there at Smith's Cove?

A. Mr. Bridges wrote me a letter at one time, in which he
pressed, I think, a view of that kind.

Q. Didn't he write you a letter in which he stated that the s
gestions of yours for any bulkhead less than a stone bulkhead w
entirely impracticable and would not be considered?

A. Well, something to that effect.

Q. And did not you make to him substantially the same re
that you now say that you made to Mr. Forrest, that that could
be done and it was in violation of the contract, and further state t
it would be confiscation of the property of the person who would
subject to this lien under the law?

A. I think, perhaps, that is about what I said to Mr. Bridges.

Q. And is that your view at the present time?

A. Yes.

Q. Under those circumstances, then, you would have refused
build a stone bulkhead, as required by or suggested by
Bridges?

64 A. I surely would, unless I had been required to do so by the decree of the court. I do not think that I could have enforced a lien on the tide lands that I filled in. I think that every one owning a piece of ground there could restrain me from the collection of the money which would be imposed by a stone bulkhead, on the ground that they had had no notice that any such expensive improvement would be required, and that they had had no opportunity to appear and object to such a contract if such a contract had been made, and it would be practically a confiscation of their property without due process of law.

Q. And, therefore, you would have refused to have proceeded with any such requirement?

A. Well, that is my impression; although I had no such thing presented to me—I had no plans or specifications of any kind, except as I indicated, Mr. Bridges wrote a letter.

Q. Was not that your attitude both with Land Commissioner Forrest and Bridges, that this was too expensive and that you could not and would not do it, Mr. Hays?

A. Well, I would say "Yes," that I would have declined to do it if they had submitted such plans to me, but they did not submit any; they did not offer any; they only talked in a desultory way, either in correspondence or in a personal conversation; but there was only one or two conversations either of us ever had on the subject of that bulkhead. Mr. Forrest practically stated—postponed his view, by saying that we had to postpone the further consideration of proposed changes in the bulkhead on account of the government canal that was in contemplation.

65 Q. Now——

A. (Continuing:) Now Mr. Bridges then, as I recall it, we had a conference before the Board—before the Governor himself and the Attorney General, or rather Mr.—General Vance.

Q. Those are the conferences which you referred to before?

A. Yes; we had the conferences then and after that I heard nothing more excepting through the published report of Mr. Bridges as Commissioner of Public Lands, wherein he had taken up and corresponded with General Alger concerning the government cooperating with the state of Washington with reference to this work and the requirements under that contract which required the state to furnish a right-of-way across that neck of land between Salmon Bay and Smith's Cove.

Q. Now under this Act of 1893, being the Act under which this contract or alleged contract was let, the original plans and specifications were prepared and submitted by the contractors, were they not, Mr. Hays; does not the Act so provide and contemplate?

A. Original plans?

Q. Yes, and specifications for bulkheads, etc.?

A. Yes.

Q. What?

A. Yes.

Q. That is there prepared by the contractors?

A. By the contractors.

Q. And the original plans and specifications for bulkheads, et in this contract were prepared by you?

A. By Mr. Hamlin.

66 Q. Acting on behalf of yourself and Mr. Shea?

A. Yes.

Q. Is that the same Mr. Hamlin that was on your bond?

A. Yes.

Q. Now, did not Mr. Forrest and Mr. Bridges suggest to you th you submit plans for a stone bulkhead, as you did for the origin bulkhead under the contract?

A. They never did.

Q. They never did?

A. No.

Q. You did not think it was encumbent upon you, after they sai the plan for a stone bulkhead would be required, to prepare thos plans as you had prepared the other plans, did you?

A. No.

Q. Now, coming to this question of the north canal; is that wha you call it?

A. Yes.

Q. What do you mean by the north canal?

A. I mean what is called the Lake Washington Canal—the cana connecting Puget Sound at Salmon Bay with Lake Washington.

Q. The present Lake Washington Canal?

A. The present Lake Washington Canal.

Q. Was there anything in your contract relating to the presen Lake Washington Canal?

A. Yes.

Q. What is that?

A. A provision in the contract as contemplating the work of tha government canal, if it became necessary to cut across thi

67 neck of land between Salmon Bay and Smith's Cove, con necting the two bodies of water at Salmon Bay, and for th purpose of facilitating such possible work on the part of the govern ment, the State of Washington required me to excavate from such a channel across between the two bodies as would be necessary t complete the filling of the lands in at Smith's Cove, it being th agreement that the State of Washington would provide this right-of way, and that they would supply that to me without any cost or an expense to me.

Q. Was not the original idea, Mr. Hays, that the governmen canal connecting the Sound and Salmon Bay should be on a rout extending north from Smith's Cove waterway to Salmon Bay?

A. Yes.

Q. And was not that route subsequently abandoned?

A. Yes.

Q. And the route of the present Lake Washington canal adopted

A. Yes.

Q. So that the route of the present Lake Washington Canal ha not anything to do with your contract and never did have, did it?

A. Well, I should say, so far as the route of the canal is concerned it had nothing to do with it. The canal itself, however, did. It wa

he contention of a great many of the citizens, in fact a majority of hem here who signed petitions to the extent of nearly six thousand or the Government of Washington to approve this contract to have he canal in front of the city terminate, instead of out at the open break-water of Shilshole Bay. There was a commercial de-
68 mand for an arm of the canal at least terminating in front of the city of Seattle.

Q. That is by the way of a route extending north from Smith's Cove waterway?

A. So as to connect with the government canal at Salmon Bay, if it was extended out to Shilshole Bay.

Q. You made an application for a contract under the law of 1893?

A. Yes.

Q. That contract, or a contract was prepared, was it not, and signed by W. T. Forrest, Land Commissioner?

A. Yes.

Q. It was not approved by Governor McGraw, the then governor of this state?

A. No.

Q. I understood you to say that Governor McGraw refused to approve that because of the then proposed route of the government canal from Smith's Cove waterway north to Salmon Bay?

A. Yes.

Q. And he said that before he would approve of such a contract, that you and your copartners must enter into an agreement——

A. A modified agreement.

Q. (Continuing:) A modified agreement, whereby you would agree to dredge out the government canal, or the portion thereof extending north from Smith's Cove waterway?

A. Yes.

Q. And that was the main consideration, was it not, of Governor McGraw signing the modified agreement, that you should
69 dredge out the government canal extending north from the Smith's Cove waterway to Salmon Bay?

A. That was the impelling force that finally caused him to approve the contract, or one of the greatest——

Q. When was it that the Smith's Cove route for the government canal was abandoned, and the Shilshole route taken up?

A. There was a proceeding here brought after that approval of that contract, to condemn that right-of-way across that neck of land; a jury passed upon it and I think awarded Mr. Hill $1,800 or $1,900—eighteen or nineteen hundred dollars—and he was displeased and wanted $28,000 for that right-of-way, and I am informed that he referred the matter back to the Secretary of War—there was some rumor at that time—and through influences that were not exerted, I don't think, locally here, the canal route was changed to terminate at Shilshole Bay instead of at Smith's Cove.

Q. Now, when did that change take place?

A. I think that took place, probably, in 1897.

Q. It was during the time that Mr. Robert Bridges was Land Commissioner?

A. I think it was—I am not positive, but I think he was.

Q. Now, sometime in 1897, all of that feature of your contract which related to the dredging of the portion of the government canal extending north from Smith's Cove waterway was terminated, was it not?

A. Well, I do not so regard it. The changed plan of the government itself with reference to the canal did not change the commercial advantage of a terminus at Smith's Cove. That ad-
70 vantage was commonly and generally recognized by the people of Seattle, and especially those who owned property in the Smith's Cove district, and there was a considerable feeling manifested throughout the city too, that the government had made the change.

Q. Your contract, however, your modified contract related to and referred solely to a government canal extending north from Smith's Cove waterway to Salmon Bay, did it not?

A. Yes, yes, that that should be made a part of the government canal.

Q. And when the government abandoned that proposed route and took up another route, then that feature of your contract was eliminated, was it not, Mr. Hays?

A. As I have explained, there was a local sentiment here entertained by the people, and especially by those in Smith's Cove that owned property there, as one of the elements of the work to be done was the excavation of a waterway connecting with the proposed north canal or Lake Washington canal, making a terminus of that canal at Smith's Cove, and enhancing the value of their holdings, as they thought, by virtue thereof, and they insisted, and insist today, as far as I am able to determine, on that arm of the canal being constructed.

Q. Do you know that the state of Washington ever had any idea or passed any law or adopted any plan whatsoever to build any canal over there, other than the canal which was to be constructed by the United States Government?

A. Well, no; I do not know that there has ever been any legislative enactment of any kind, further than the law which author-
ized the making of this contract.

71 Q. Now, Mr. Hays, you knew, as a matter of fact, that when the government abandoned that proposed route from Smith's Cove to Salmon Bay and took up the other route, that there was not, and never would be any canal across that neck of land, did you not?

A. Why, I most certainly fully believed and believe now that the rights of the contractors and the rights of the land owners there compel the completion of that canal at Salmon Bay to connect, even though the general route of the Lake Washington Canal has been made to terminate at Shilshole Bay. I think, to impress those land owners with the burden of the filling of that land to maintain the local status that they gained by virtue of that contract, that has got to be done.

Q. Now Mr. Hays, who is going to build that canal extending north from Smith's Cove waterway to Salmon Bay?

A. W. F. Hays, and W. F. Hays as assignee of Frank Shea, will build that canal if permitted, and I have, all the time, at all times been ready and anxious and willing, with plenty of means to do it from the start.

Q. Under your contract did you propose to dredge out and complete that government canal fully from the Smith's Cove waterway to Salmon Bay?

A. I did not.

Q. How much did you think you were to do?

A. I figured, according to my engineer's report, that it would take practically all of the earth excavated; that the original wall, whatever wall would be required there, would probably be put in by the government. I figured that would be the case.

72 Q. That is, you figured——

A. (Interrupting). I did not expect to lay out any money except for the purpose of the excavation of the earth by hydraulic dredging to bring that earth back into Smith's Cove to complete the filling, because the lands in the waterway were hardly sufficient, according to estimates, and *ti* would have to be taken either from the cut across the waterway, or sluiced from the hill.

Q. You alleged in the complaint and you stated on your direct examination, that there was not sufficient earth to be dredged in the waterway itself to fill in the adjoining lands?

A. Yes.

Q. Therefore the Governor required, as a part of, or as the consideration of his signing the modified agreement, that you dredge out other lands?

A. Well, I don't think that the Governor had that in his mind——

Q. As to the amount of the earth to be furnished by the waterway.

A. I think his whole, sole idea was the assistance that this canal, or this waterway improvement would be to the government, and it would not be any obstruction in the way of the work of the government canal.

Q. Did you contemplate being paid for the earth which you would take out of that upland extending from Smith's Cove waterway north?

A. I figured that all earth that was put in on the lands there, I would get my fifteen cents or sixteen cents a yard for.

Q. Even the earth which you took out of the north canal?

73 A. Even the earth taken out of the north canal. I know that question had been determined by the Supreme Court of the state of Washington in the case of the South Waterway contract, in which they had sluiced down from the hill outside of the tide lands, a good many acres, and filled in the land, and it was held that that was an improvement within the law.

Q. Now, as I understand it, it would not be possible to fill in the tide lands covered by your contract adjoining Smith's Cove Waterway, except by getting additional earth from some other source?

A. No. I do not with to be understood that way. There would be a fill of the tide lands along the waterway on both sides, but not

extending clear up to the meander line, which would leave in the neighborhood, according to my engineer's report, of between one fourth and one-fifth of the lands that had not been filled in; which would leave it—well, not a completed filling of all the land.

Q. So that you could not carry out your contract in fullness and completeness except by getting earth from some other source than the Smith's Cove Waterway?

A. Oh, that is an incorrect construction.

Q. Is not that just what you have stated?

A. No. If I did, I desire to recall that statement. I mean to say that the contract could have been in all things fulfilled and completely performed without taking any earth from adjacent lands in so far as the contract itself is concerned, for it did not require by its terms the putting on that land of any other earth than the earth taken from the waterway; and whatever earth that
74 waterway furnished would be compensated to the contractor at a rate of not exceeding sixteen cents per cubic yard, measuring it——

Q. If you could get enough earth to complete your contract within the waterway, why was it that you were going to get earth out of the North Canal?

A. I didn't say I could get enough to fill it—to complete the filling—I could not fill all of that land. My contract did not provide for filling any more than I could fill from that waterway. Now, of course, it was the desire of the state, as also the owners of tide lands, to have their lands all uniformly filled.

Q. And yet the Governor would not approve of your original contract until you had agreed to dredge out the North Canal, and take the dirt from that and fill in these lands?

A. Well, he did not require even that. The point from him was that he wanted that canal to be excavated as much as possible as the contractors could afford to take it out without expense unnecessary to them, and thus aid the government in its work of the final construction of the terminus of this canal at Smith's Cove. Governor McGraw was not solicitous at all about the work being all done only to be done so that it would not in any manner interfere with the government canal, but would in fact be an assistant and aid to the government canal in the proposed improvement of the government canal.

Q. Did you not state to Mr. Bridges and to his successor, Mr. Calvert, both orally and in writing, that you could not proceed with this contract until a right-of-way was given you by the state of Washington for the route of the North Canal?

75 A. I think, perhaps, I did.

Q. And you stated that this morning, did you not, substantially, in your direct examination?

A. Yes.

Q. In other words, if I understand you correctly, you stated then and you state now that you cannot carry out this contract of yours unless you are given the right-of-way across the route of the North Canal and are given the privilege of dredging out the earth in that proposed North Canal?

A. Well, the contract speaks for itself. My construction of that contract might go into the record for the purpose of showing what I feel and what I believe, that is all.

Q. What I want to get at is, what you stated to them you would do and would not do under this agreement unless you were given a right-of-way across the route of the North Canal; you did take the position then and you take the position now that you have got to have that right-of-way before you can proceed with this contract?

A. That has been my view from the start.

Q. And it is your view now?

Q. And it is my view now.

Q. So that if there is no means by law or otherwise, of getting a right-of-way across the North Canal, this contract of yours can never be performed, can it Mr. Hays, and it never will be performed by you?

A. That is a very, very remote question—to say the question of the possib-lities of that canal—now, if the government of the state of Washington shall decline and refuse to do what it
76 has agreed to do, then what the other member of the contracting party may do, is a question to be determined when we reach it. It is an old saying in the law "We cross a bridge when we get to it". That contract provides for certain things, and the principal thing in that contract is that I shall cut through that neck of land between Salmon Bay and Smith's Cove, and it is emphasized the more by virtue of the fact that the governor of the State of Washington then declined to approve the contract unless that cut was made.

Q. And since, substantially the year 1897 to the year 1915, you have refused and you do refuse and you will refuse in the future to ever do anything on that contract until a right-of-way is provided for the route of the North Canal extending north from the Smith's Cove Waterway to Salmon Bay?

A. I have never once refused to proceed. I have never been required to proceed with or without that cut across the neck of land between Salmon Bay and Smith's Cove, by either Mr. Bridges, Mr. Forrest, Mr. Calvert or Mr. Ross or Mr. Savidge, either of the representatives of the state of Washington, as commissioners of public lands. Neither have ever told me to make any proposition looking to my proceeding with that work in the absence of that right-of-way. Neither have ever supplied me with plans and specifications of any kind or character covering any change or proposed change of bulkhead; and all that has ever been said on the subject of the right-of-way has been said, as I have indicated, in conversations that we had at different interviews at different
77 times during those years. They have know- as much as I have concerning the work progressing on the government canal.

Q. Since the year 1896 up to the present time, neither the United States Government nor the State of Washington have ever provided any ways or means for a canal extending north from the Smith's Cove Waterway to Salmon Bay, have they?

A. They have not.

Q. And there is not now at the present time any such movement on foot that you know of, is there?

A. Well, no, I do not know of any. I have not heard of any. Only, as I said to you in the former answer, that there was entertained by the owners of those lands a very strong desire for a terminal of that canal in front of the city instead of out at Shilshold Bay.

Q. Now, referring to your arrangement with Mr. Hamlin, your engineer, you say he bought some piles for you?

A. No, Mr. Leine, Leine & Wright were my contractors that I employed to do the work.

Q. Where are they?

A. I don't know. I have not heard from Mr. Leine or Mr. Wright for a good many years.

Q. And they bought piles, did they?

A. Yes.

Q. What kind of piles did they buy?

A. Well, they were according to the plans and specifications of their contract.

Q. How many did they buy?

A. I don't really know.

(The Court:)

Q. What is Leine's first name?

78 A. W. L.—I have the contract within here.

(Mr. France:)

Q. You had a contract with them?

A. With Leine, yes sir—I think I have it with me here. I know that I have it somewheres.

Q. You haven't got it?

A. I have a contract with him—I may not have it here—I guess it is in my office—hold on——

Q. You say they went there and began work on the 3d of May, 1896?

A. Yes.

Q. You did not contemplate starting work until the 4th of May, did you, Mr. Hays?

A. Well, I don't remember now just what the contemplation about the commencing of the work was. They had to begin it within a certain time under the contract, I know that; and they had to perform it in a certain way. I paid them a certain amount of money. They started their work. W. L. Leine is his initials.

Q. Didn't you write Land Commissioner Forrest that you would start work on the 4th of May?

A. Well, it is so long ago that I have forgotten, but I presume I did. If I did and you have the letter, I could be positive about it.

Q. And if you did so write him, would you not think now that you did not start work until that time?

A. Yes, I would think that was correct.
Q. And if you alleged in your complaint at the time you started e case of "Hays against Hill and others" that you commenced work on the 4th of May, and if you so alleged in this complaint, you would rather be inclined to think it was the 4th instead of the 3d that you started?
A. Why yes, I would say that would be correct.
Q. And then, instead of working two days, you only worked e day, because you stated that you were stopped on the 4th?
A. If I wrote Mr. Forrest on the 3d and he received the word the 3d or the 4th, whatever date that was, then Mr. Forrest's notiation to me came on the 4th of May to desist from the making of e improvement.
Q. What time of day did you get the communication from Mr. rrest?
A. I have forgotten.
Q. Do you remember whether it was the morning or afternoon?
A. No, I do not.
Q. You do not remember?
A. I do not.
Q. And you have not a copy of it?
A. I don't seem to have a copy of that.
Q. You seemed to have preserved the other records in this case ite carefully?
A. Very few. I am surprised at the few records I have of their ters. I have preserved every letter that ever looked to the quesn of doing the work or of the changing, or of any proposed change bulkheads—I preserved all those.

Redirect examination.

(Mr. Thompson:)

Q. Mr. Hays, some questions were asked by counsel about the statements in conversation, and perhaps in letter, I forget about that—with one of the Land Commissioners, perhaps Mr. Forrest and his engineer, Mr. Gillis, ut Mr. Forrest saying that it might possibly be necessary to have tone bulkhead in there?
A. Yes.
Q. Was there ever, at any time, a decision by Mr. Forrest or by other of the Land Commissioners that the stone bulkhead uld actually be required?
A. No.
Q. Was there ever any serious conversation on that question as whether or not a stone bulkhead would have to be built out there?
A. There was not.
Q. In these later conversations which you had long after that, the latter demands that you have introduced here for them to pare a plan of the bulkhead, was there ever any recurrence as he question of the stone bulkhead?

A. None.

Q. You have so testified and were cross examined about Governor McGraw's objections there. Have you the two letters from Governor McGraw which you showed me with reference to the reason why he was not ready to sign that contract without a modification?

A. I have.

Q. Can you produce those, please.

Mr. France: If you have no objection I will substitute copies instead of the original exhibits which I have, or I shall introduce them.

Mr. Thompson: I have no objection to your substitut-
81 ing copies instead of the originals.

The Witness: Here is one letter from the Governor, but that is quite a few years later. (Producing)

Mr. Thompson: The one that I specially desire is the letter in which his reasons are given for the delay until the waterway question is determined.

(Whereupon a recess is taken until two o'clock p. m.)

82 Seattle, Wash., April 23, 1915.

Afternoon Session, Two o'clock.

Continuation of proceedings pursuant to recess, all parties present as at former hearing.

W. F. HAYES, (same witness) on the stand for further Redirect Examination.

(Mr. Thompson:)

Q. Mr. Hays, did you find the letter I suggested, of Governor McGraw's?

A. Yes.

Q. I wish you would refer to it, please.

A. I thought that I had it—that is not it (pointing), I will get the letter in a minute.

Mr. Thompson: This is the assignment by Frank Shea that I told you about.

The Witness: Here is the Governor McGraw letter (showing).

Mr. Thompson: I would like to have identified, Your Honor, exhibit number "5," the assignment of Frank Shea to Mr. Hays.

Mr. France: If Your Honor please, I object to this, because it does not appear that this has ever been filed with the Land Commissioner.

Mr. Thompson: A copy of it is part of the record.

The Witness: Here is the letter from Governor McGray (showing), that is the first one.

Mr. Thompson: I desire to have this marked exhibit number "6," a letter to W. F. Hays, the plaintiff in this case, by Governor McGraw.

Mr. France: That is object- to as irrelevant, immaterial an-
83 incompetent. I do not think any letters passing be-
tween Governor McGraw and this plaintiff prior to the enter-
ing into this contract has any materiality.

The Court: They are just being marked for identification now.

Mr. France: I thought he was offering them.

Mr. Thompson: No, I have not offered any of them yet, except for identification.

(Two letters marked "Plaintiff's exhibits 6 and 7 for identification, respectively.)

Q. Mr. Hays, did you find the telegram which you spoke of that you did not know whether you had found or not?

A. No, I did not find that telegram. I found a later telegram.

Q. In regard to the same matter?

A. Yes, It was for that meeting to be held at the Butler Hotel, instead of the Rainier Grand as I stated. (Showing).

Q. Before offering this, because I do not know whether it has any significance, I will first ask you did you receive this telegram which you handed me?

A. Yes.

Q. About what date?

A. About the 13th day of July, 1896.

Q. Better look at it again, is that 1896?

A. There is not any date on it—no other date—but I remember it.

Q. I thought there was a date on it?

A. No, I am unable to see it.

Q. It has just got the date of "July."

A. Well, I say 1896, because our negotiations were during
84 that summer, and Mr. Forrest went out of office that year,
1896, as I recollect it.

Q. Was there any other meeting held in pursuance to that telegram?

A. Well nothing—a mere informal matter—I don't remember whether there was any informal meeting. I think I met Mr. Gillis there, and we talked somewhat about the exigencies of the work.

Q. Nothing done at that meeting which you know of?

A. No.

Mr. Thompson: I don't think it will be worth while to offer the telegram then—it simply would be encumbering the record.

The Witness: Now, I received a letter from Mr. Forrest too—prior to that it was.

Q. Can you state whether it was about the date of the letter?

A. About the time of the letter, in June, and at that time I was endeavoring to assist in every way I could to determine the nature of the change, if any was required, from the original plans, and that was the last letter that I received from the Land Commissioner concerning these negotiations, and concerning which I had sent in several reports of expert engineers—engineers of national reputation,

and that letter was the one in which he expressed some positive views.

Q. Now, he refers in that letter to your offering to secure the written opinions of certain competent civil engineers, with reference to the bulkhead; I will ask you to state to the court what you did in that respect.

A. I obtained the opinions of General William Sooey
85 Smith, and Colonel D. W. DeCoursey, and Mr. Brown—Mr. Brown was an engineer here in this city, very prominent, and one or two others whose names I do not now recall. General William Sooey Smith, I might say, made a trip from New York to Seattle and investigated the ground; went over it most carefully, and I have his correspondence on the subject after he had examined the ground and determined the nature of the improvement required, and he forwarded his plan, which I think was filed, a copy of it, with the Commissioner.

Q. I will ask you Mr. Hays, not for evidentiary purposes, but only to enable me to proceed with rapidity, whether a copy of that letter is in this report?

A. Here is a copy of the letter—here is the letter (showing).

Q. You have the letter itself—this is the letter from Mr. Forrest.

A. This is the letter from Mr. Forrest.

Q. I was asking you about the letter from Mr. Sooey Smith, whether that was submitted to Mr. Forrest?

A. Well, as to General Smith's correspondence, I do not think that it was submitted to Mr. Forrest, but his plan that he submitted to me was just a plan.

Q. His plan that he had prepared?

A. That was submitted, but his various letters and discussions on the subject were not.

Q. What other plans besides General Sooey Smith's did you present to Mr. Forrest?

A. I state Colonel D. W. DeCoursey.

Q. In what way was that submitted to the Land Commis-
86 sioner; by way of letter?

A. His report—a copy of his report, or the original I believe, was submitted—just filed with him—probably mailed, as I recollect it, I think.

Q. Have you ever since that——

A. (Interrupting.) I have got a letter here which will indicate that that report was in the hands of the Commissioner. (Showing.)

Q. That was July 9, 1896—I will offer that for identification.

(Document marked "Plaintiff's exhibit 8 for identification.")

A. Here is another letter with reference to Webster Brown, the engineer whom I referred to as furnishing plans.

Mr. Thompson: I will offer that letter for identification also as number "9", being the letter of W. T. Forrest to W. F. Hays.

(Document marked "Plaintiff's exhibit 9 for identification.")

Q. Have you any other—you have not found any letter of Governor McGraw's?

A. Yes, I gave you that. (Showing.)

Q. No; this is Mr. Forrest's letter—I wanted Governor McGraw's letter.

A. I thought that was marked exhibit Number "6" or "7", that you have identified them.

Q. Yes, I see that we have introduced it as number "7".

A. Here is another letter of Governor McGraw's that relates to the valuation of the tide lands when filled, as compared to them when not filled.

87 Q. That is dated 1905—I will offer that for identification, a letter from McGraw to Hays.

(Letter marked "Plaintiff's exhibit No. 10 for identification.")

A. I have a letter from Mr. Bridges, of date November 17, 1898, and pursuant to which I met——

Mr. Thompson: Just wait a minute, let me have it identified.

(Last letter referred to is marked Plaintiff's exhibit No. 11 for identification.")

Q. Pursuant to or in connection with plaintiff's exhibit number "11", what did you do, what occurred?

A. I went to Olympia, the state Capitol, and had a conference which had been prearranged with the Governor of the State, then Governor Rogers, and Thomas M. Vance, then Assistant Attorney General, and Mr. Robert Bridges, Land Commissioner at the time.

Q. Was Mr. Vance acting as Attorney General at that time?

A. Mr. Vance was acting as Attorney General at that time. And in that meeting, after full presentation of the matter by Mr. Bridges on the side of the Land Commissioner and myself, it was the decision of the Governor and of Mr. Vance——

Mr. France: I object, if Your Honor please, unless it is made to show that the record was the record of such a meeting and that there was such a decision made.

The Court: The record will be the best evidence.

Mr. Thompson: We do not know whether there was any record; it was a conversation between them, and we have the right to 88 give the conversation, because they could direct him to cease work or direct him to go to work without making a record of it. There is no rule requiring any such record—no rule of law, as I can understand in none of the departments.

The Witness: —of practice.

Mr. Thompson (continuing): Of practice, which would require any record to be made, or that Mr. Hays was bound to keep any such record as that; but if he met there at their call and they gave him any directions—I do not know what it was, as a matter of fact and I do not know whether it will be of any value—but any prohibition that they gave him with reference to working, or any refusal they

made to give him a bulkhead or plans for one, would be competent, but I do not know yet what occurred.

Mr. France: I want to ask Mr. Hays a question in regard to this.

(Mr. France:)

Q. Governor Rogers is dead, is he not?
A. Yes.

Mr. France: Then I wish to make the further objection——

The Witness (continuing): —and so is Governor McGraw. This meeting was before Governor Rogers in 1896.

Mr. France: I further object to any conversation between Hays and Governor Rogers, as irrelevant, immaterial and incompetent.

Mr. Thompson: If it was competent in any event, the death of Governor Rogers would in no wise affect its admissibility.

Mr. France: Any statement which Governor Rogers may have made to this witness in his favor I think would be immaterial.

89 Mr. Thompson: It might be immaterial, but it would not be incompetent.

The Court: If this was a meeting of the Public Service Commission or anything of the kind that they did not keep a record of, but we want to find out whether there was a record of it.

(Mr. Thompson:)

Q. In order that a determination may be clearly made as to what this was, just tell the court what it was, and the court can strike from his consideration if it is not legitimate; just state what meeting was and what was taking place there.

A. The meeting was, as I have stated, in pursuance of that letter which you have in your hand, in which Mr. Bridges required me to make a showing why I had not proceeded with the work under that contract, and I appeared before the Governor, the Attorney General and Mr. Bridges and made an oral statement of all the facts; and in that hearing and at that hearing——

Mr. France: Now, if Your Honor please, I desire to renew my objection.

Mr. Thompson: I am not offering this as evidence; I am offering it for the purpose of letting the Court see it.

Mr. France: Just a minute, Mr. Thompson; the witness's statement up to the present time discloses the fact that this was not intended to have been any official hearing, because the Governor of this state and the Attorney General and the Land Commissioner do not and have not ever formed any official body like the Board of Land Commissioners, where a matter of this kind could be heard and determined; therefore, all that it could have been was just an

90 informal meeting between those three gentlemen, of which no record could be kept, and would not be binding, and I think it is inadmissible.

Mr. Thompson: We think it is competent, for this reason, Your Honor, because those were the people who were entitled to determine whether or not a bulkhead of any given character should be prepared for this work, and in that conversation he was brought down there, as he says for the purpose of showing why he had not proceeded with the work; he went down there to show them why he had not proceeded with the work and made, as he says, a showing. Now what that showing was, Your Honor has not in his mind, but he made the showing and upon that showing, as I understand it from something that cropped out in the examination this morning, they decided that he was not to blame, but that the state was to blame, and, therefore, they exonerated him from making any further showing than he had made.

The Court: Who exonerated him?

Mr. Thompson: The Land Commissioner and the Attorney General, and the Governor.

Mr. France: Under the law of 1893, upon which Mr. Hays' rights are based, if at all, the only person who has any authority to make any change, if anyone has any authority, and we claim that no one has such authority—but if anyone has any authority, that person is the Land Commissioner, and the Land Commissioner alone and, therefore, any meeting between the Governor and the Attorney General would not be binding, and I think Mr. Hays will admit that to be the case.

Mr. Hays: I think that is certainly true.

Mr. Thompson: You don't think the presence of the governor and the Attorney General would deprive the land Commissioner of his authority?

The Court: I do not see how this conversation between the Governor and the Land Commissioner and the plaintiff here could assist us in arriving at any determination of this case. There are organized bodies and officials who have jurisdiction of the matter, and the fact that he discussed the matter with the Governor and with other persons who might possibly make up a commission, in private conversation would not help us any.

Mr. Thompson: If Your Honor please, I do not want to argue Your Honor's ruling, but we have already offered in evidence a letter, or we have had indicated as an exhibit a letter which in its terms shows that he is called there for the purpose of making a showing as to why his contract should not be cancelled, because of his failure so far to do any more work than he did. Now Your Honor can see at once that one of the sharp legal questions that is going to come up later in this case is the question whether there has been laches on the part of Mr. Hays such as would in an equitable proceeding estop him, or in other words by a sort of equitable limitation prevent his exercising any power under this contract, and that is the object of this, to show that he went down there.

The Court: Who did you say was present?

The Witness: Governor Rogers and Thomas M. Vance, acting as Attorney General.

92 Mr. France: If the Court please, he is going to testify w
Governor Rogers said at that time.

The Court: I asked who was present at this conversation wh
you started to tell about.

Mr. Thompson: Name all the parties that were present.

A. Mr. Bridges, Governor Rogers and Mr. Vance, then acting
Attorney General, and Governor Rogers acting as Governor.

The Court: I think I will let it go in the record.

The Witness (continuing): And I was present——

The Court: I will let it go in, if Mr. Bridges was there—this is
letter and he is here now.

Mr. Thompson: It was at his invitation.

Q. I will ask you now, Mr. Hays, briefly, what was done th
as to you making a showing?

The Court: Was there anything said that was in the presence of
Bridges?

The Witness: All was said in the presence of Mr. Bridges. W
well. The first proposition that I put up to Mr. Bridges and
Governor was that this was a contract between the state of Wash
ton and myself that it took two to make a contract and two to ca
it. That as far as I was concerned, I was there at their invita
to make my part clear, that I had fully performed every detai
the contract that I was capable of performing without their obst
tion and without their failure to perform their portion; that the
quirements under the cojtract were mutual—I had certain obl
tions by that contract to perform; they had certain required duti
perform; that when they performed theirs I was ready,
93 and willing and very anxious to perform mine. I pointed
the fact that they had not established for me a plan of b
head; that I had begun the work in good faith and the Com
sioner of Public Lands had stopped me, because under the law
had a right to do so when in his judgment there was some impr
ment essential to be made in the bulkhead or the retaining wall; t
exercising his right, he had stopped me and requested me to su
or furnish certain reports of bulkheads used in similar places, w
I had done. I had exhausted almost every possible means to a
the state in deriving, or arriving at a conclusion as to the natu
the bulkhead to be required in the Seattle Harbor—this was be
the demonstration in the Seattle Harbor, in other parts of it, of
service facility and durability of the brush and pile bulkhead—
the reports that I had supplied showed, among others, Mr. Sm
report that there had been on the coast of Holland for one hun
years the same kind of bulkhead and was as good apparently t
as it was when it was put in—that there had been a suggestion a
a stone bulkhead, which impressed me as not only violative of
contract, but as designed to defeat the contract.

Q. Now Mr. Hays, what was the result of that conversation?

A. Governor Rogers and Mr. Vance both said I had fully and duly performed every part of my contract necessary to be performed.

Q. What did Mr. Bridges say?

A. Mr. Bridges was silent.

Q. Was there anything said or agreed upon between you
94 and Mr. Bridges at that time?

A. Nothing further. Mr. Bridges wrote a letter after that to Secretary of War Alger, in pursuance, I assume, of this hearing, with a view of hastening the matter.

Q. Have you a copy of that letter?

A. I have, in the reported volume of his annual report.

Q. On the 17th day of November, 1897?

A. Yes, that is on page 77—and I would suggest, if you will pardon me, that you read this letter into the record.

Mr. Thompson: I was going to identify them all and then read them, if they are competent. I desire to identify now, if Your Honor please, the copy of the letter in the Commissioner's report, at page 77 and 78, identified exhibit number "12," being a letter of Robert Bridges, Commissioner of Public Lands, to Russell A. Alger, Secretary of War of the United States.

Q. After that, Mr. Hays, was there any other communication that you desire to offer in connection with this?

A. None with Mr. Bridges. There was, following that, with Mr. Calvert, his successor.

Q. What do you want me to identify now?

A. In 1900, or about 1900, I had an interview—I called on Mr. Calvert, and in pursuance of my call he wrote me at divers times in relation to this contract, and at one time he said he would adopt the plans and specifications for a bulkhead in 1903.

Mr. Thompson: This is 1901 now—I want to identify this—I wish to identify letter dated November 2, 1901, from the Commissioner of Public Lands to the complainant, Mr. Hays.

95 (Document marked "Plaintiff's exhibit No. 13 for identification.")

Q. After that, now go on.

A. I called the Commissioner's attention to the law——

Q. That was Commissioner Calvert?

A. Commissioner Calvert—in reference to the statute which required—made this specific provision that upon the letting of any such contract, such contract as the one at bar—it became the duty of the Commissioner of Public Lands to forthwith appraise the tide lands affected by such contract, and, fearing the possibility that when the work of filling those lands might have been accomplished, that some holder of lands who was affected by such a lien thereby cast upon it, might raise objection that the land had not been appraised, as was specifically required, and apparently mandatory in the Act that they should have been, pursuant to the contract.

Q. What was done with reference to that?

A. Then Mr. Calvert, after a long correspondence first said I would appraise the land.

Q. Later on did he take any different view?

A. Later on—there is a letter of 1901 (showing).

Mr. Thompson: I will have this identified as exhibit "14."

(Document markes "Plaintiff's exhibit No. 14 for identification."

Q. After receiving that letter from him on November 2, 1901 was there anything further done with reference to that appraisement?

A. Later on, in 1903, October 24th, I received a letter from
96 Mr. Calvert, the Commissioner of Public Lands at that time that the Board had finally declined and refused to make such appraisal.

Q. That is October 24, 1903, and that letter we have identified now as exhibit "15."

(Document marked "Plaintiff's exhibit 15 for identification.")

A. (Continuing:) A day or so later I observed something in the newspaper concerning the action of the Board, which I did not fully understand, and I addressed a letter to Mr. Calvert, the Land Commissioner, to which this is an answer. (Showing.)

Mr. Thompson: I will identify this as number "16."

(Document marked "Plaintiff's exhibit No. 16 for identification."

Q. This letter from Commissioner Calvert to Mr. Hays is dated October 31, 1903.

The Witness: I would like to enlarge a little on my former statement.

Q. If there is any explanation which you want to make of it, you can make it.

A. I stated that there had been petitions variously signed by land owners in Smith's Cove, urging the Governor to approve the contract when it was then under advisement by him; and I had one signature—one petition which I especially prized and I had not filed that with the Governor—it was signed by Colonel John Leary.

Q. You do not think it had any effect on the Governor if he did not get to see it?

A. The Governor saw it. Mr. Leary and he were at one
97 time partners, and so I retained that.

Mr. Thompson: I will ask to have that marked as an exhibit.

(Document marked "Plaintiff's exhibit No. 17 for identification."

A. (Continuing:) In 1903 there was a letter written me, to which this seems to have been an answer to my reply, concerning some objection because there was not any plans or specifications, and I pointed out in a letter to Mr. Calvert, the Commissioner, that there was some mistake, because plans and specifications had been attached to the contract and were duly filed in that office, and if

they had been lost or mislaid in the Department it was no fault of mine, and certainly the contract ought not to fail because of some omission of the state or in that department.

Q. And that is his answer?

A. That is his answer.

Q. Of date September 21, 1903, from the Commissioner to Mr. Hays—I will ask to have that marked as an exhibit.

(Document marked "Plaintiff's exhibit No. 18 for identification.")

A. (Continuing:) Here is another letter. This is only material in regard to shewing that the discussion in regard to Smith's Cove was going on, (showing letter) that is from his deputy.

Mr. Thompson: I will have this marked as exhibit number "19," being a letter from J. L. Murray, Chief Clerk in the office of S. A. Calvert, Commissioner of Public Lands, in order to make a connection with Mr. Hays' letter.

(Document marked "Plaintiff's exhibit No. 19 for identification.")

98 Q. Now, in order to make a connection with that, Mr. Hays, taking the date of that letter; did you receive it about that date?

A. Yes sir.

Q. Now, that is November 15, 1901—I wish you would look at that exhibit, identify it, and tell the Court what was the matter under discussion that is referred to in there as being under discussion?

A. That was with reference to this re-appraisal of the land.

Q. Are there any other exhibits which you desire introduced?

A. I will state that, having been refused by the Board to re-appraise or to appraise the lands, I brought an action in the nature of a mandamus, to require the Commissioner of Public Lands to re-appraise it, and I had a hearing in court, which I think is reported in the 36 Washington, in which the court, so far as the contract is concerned—it was assailed by those same parties that had assailed it in the Hill suit, many of which you remember—some three or four different firms—and the Supreme Court of the state in that case again absolutely upheld the contract and its validity.

Q. That would be a question for the consideration and the decision of the court?

A. Yes.

Q. But, can you give it so as to have the facts in the case—what was the report?

A. That was the result of the failure on the part of the Commissioners to re-appraise the land, and made it absolutely safe for the contractor under that decision, to proceed under his contract to do the work.

99 Q. That would be a m-tter to be discussed before the court.

A. Well, that was the object, Mr. Thompson.

Q. Can you give us the volume in which the case is reported and the name of the case, so that we can refer to it without any diffi-

culty, if you have it, and if you have not, we will pass on to something else?

A. I think it is the 36 Washington. It is the case of William F. Hays, on relation, I think, of the state of Washington—or the State of Washington — relation of W. F. Hays. Now, I stated, Mr. Thompson, with reference to having commenced this work and having made a contract in writing with Contractor Leine. I have the original contract here which was then entered into. I wish to explain that contract; but that was made out by the Washington Dredging & Improvement Company; that was a corporation which I incorporated in connection with Mr. Shea, it being our purpose to have that corporation do the work—the actual work of filling in these lands as our sub-contractee; it being our purpose to build a dredge, or such dredges as might be required, and to have the work of this contract performed in that way. Though the contract which was entered into with Mr. Leine was made by the corporation, of which I was at that time vice-president, and of which I am now president and have been ever since the assignment, which I have introduced here in evidence.

Mr. Thompson: I offer that for identification as exhibit number "20."

(Document marked "Plaintiff's exhibit No. 20 for identification.")

100 The Court: Is that all the redirect examination?

The Witness: I would say at this time, it is just as well to offer this demand made upon the present Land Commissioner for a bulkhead, which was made before the bringing of this suit and seemingly in the pleadings is denied.

Mr. Thompson: That was served upon the present defendants.

A. There is the return (showing).

Q. It was served upon the present defendants in this case?

A. Yes.

Mr. France: I object as irrelevant, immaterial and incompetent. This is an affidavit of a party not present, that he served a certain paper upon the State of Washington. It is not attempted to introduce any document itself.

The Witness: It is the proof of service of the document attached.

Mr. France: It is simply proof of service of a copy of a document which is attached to it. I do not think it is a competent method of making proof of service. It is simply a notice. It is not a paper that is required by law.

The Court: The parties are before the Court and I do not see what proof of service need be made or protest in this case.

Mr. France: This was a notice of protest served on the state of Washington by Mr. Hays and he is now trying to have the affidavit of Mr. Vance that he served some notice of protest and it has nothing to do with the case.

The Court: I will pass on the materiality of these things
101 when I come to consider the case. It may be identified.

(Document marked "Plaintiff's exhibit No. 21 for identification.")

(Mr. Thompson:)

Q. Now Mr. Hays, calling your attention to the paper and ne attached affidavit plaintiff's exhibit No. 21 for identiication, I will ask you to state what you know, if anyhing, yourself with reference to the service of that paper, that otice—just what did you do towards it—did you draw it?

A. I heoped to dictate it—Mr. Vance and myself together.

Q. Did you put it in the hands of any person for service?

A. I left it with Mr. Vance, and his affidavit shows that he served

Q. I asked you whether you put it in the hands of anyone for ervice?

A. General Vance.

Q. General Thomas M. Vance?

A. Yes, sir.

Q. Do you know his signature?

A. Very well.

Q. Do you know whether that is his signature?

A. That is his signature. It is sworn to before a Notary Public.

Q. Have you any knowledge, by any after conversation, if any, vith any of the members or any member of the Commission, as to whether or not that was received?

A. No, I have not.

Q. Did you ever receive any answer from them or reply to your notice?

A. Never.

102 Mr. Thompson: I think that is all.

The Witness: I wish to make a little correction, Mr. Thompson.

Mr. Thompson: A correction?

The Witness: A correction in my statement.

Mr. Thompson: If you have any explanation to make you may do so.

A. It is not exactly a correction; it is an explanation which occurred to me after leaving the court room—whether the court might not have misunderstood my statement with reference to this furnishing of the right-of-way across the neck of land or peninsula between Salmon Bay and Smith's Cove as being the only reason or the reason why I would not proceed to perform that contract. I did not mean to be so understood. I mean to be understood that that was one of the elements in the contract that was a condition imposed upon it by its terms; but that if they had at any time furnished me the plans and specifications of a bulkhead for the purpose of going ahead with this work, regardless of the furnishing of this right-of-way, I should have proceeded with the work as far as I could until I got to the upland.

Q. In other words, the earth in the canal and under the surface

of the water would have been sufficient to do a large part of the work, would it not?

A. Yes; it would have been sufficient to fill it at least two-thirds, and possibly a little more. It would have filled all of the lands along the waterway itself as a highway and almost the entire area, leaving, of course, the portion up near the upland where the excava-
103 tion from thereon, on the upland would have been made, and it could have been economically filled.

Mr. Thompson: Take the witness.

The Witness: Just another thing.

Mr. Thompson: Will, if there is any other explanation you can make it.

The Witness (continuing): About three years ago, when it seemed probable that the government canal would be in a position to go into negotiation with the state of Washington for the additional arm of the canal, as was contemplated under this original contract, I made a sale of this contract to—not the Seattle Car Company, but to Mr. O. D. Colvin, who was vice president of that company, and is now, and Mr. Frank T. Hunter, who is a trustee in the Seattle Car Company, with a view of having those gentlemen proceed with the work, if such arrangement could be effected with the state by which they would get the plans and specifications adopted and so on, so that they could proceed with the work. And the result was that what was done by them I do not know positively, only as I have been told. Later this Act of the Legislature was passed, and I was informed by these gentlemen, that, owing to a conflict in their business—a conflict between the manufacture of steel rails and cars and so on, with the railroad company, the Great Northern Railway here especially—that they could not afford to go ahead with this contract—they could not afford to do it—that it would be a detriment to their business.

Q. What was the result?

A. And the result was they turned back the contract to
104 me and I then became and am now and have ever since been the owner of that contract, and Mr. Hunter is here, and I will ask him to identify some papers in connection with that.

Cross-examination.

(Mr. France:)

Q. When was it you sold out your interest in this contract?

A. In 1912.

Q. And how long did these parties hold it?

A. They held it until after the enactment of this statute which I am now seeking to have declared unconstitutional.

Q. Was that an absolute sale?

A. Well, it was a sale with an interest—I had an interest in the contract, contingent, of course, upon the final performance of the work.

Q. What did they pay you for it?

A. They paid $500 in cash at the time and was to pay 65 per
nt of the profit derived under that contract.
Q. Did you pay them the $500 back then?
A. No, I did not.
Q. You retained the $500?
A. I held that as a profit and loss—it struck me as though they
ould have gone ahead regardless of the interest of the Car Com-
ny and, therefore, I retained the $500.
Q. What kind of an instrument passed between you and them
nen you transferred it to them?
A. An instrument in writing.
Q. And what kind of an instrument passed between them
5 and you when you got your title back?
A. An instrument in writing. (Showing)
Q. Is that the instrument?
A. That is the instrument between us.
Q. Have you got the assignment from Colvin & Hunter back to
ourself?
A. Yes (showing). I intended to offer that in a little while.
Q. Now, I understood you to say, Mr. Hays, that you made an
pplication to Mr. Calvery and the State Board of Land Com-
issioners to have these lands appraised?
A. Yes.
Q. Why was it that you wanted these lands appraised?
A. Why you will notice on reading the Act of '93, that about the
st section of that Act requires the State Board to immediately upon
he *letter* of a contract such as that law provides for, for filling tide
nds to immediately or forthwith, is the exact language, appraise the
nds to be affected by the contract. Now, these lands had been ap-
raised something like a year before this contract was let—I am not
rtain but what it might have been a little more than a year—any-
ay they were appraised quite a while before this contract had been
ven applied for, and it was questionable whether the letting of a
ntract would enhance the value of the land in contemplation of
he improvement so that the state could derive more money for the
le of its land in view of the prospective contract or improvement,
than they could have received for the lands without such con-
06 tract; hence, I felt it safe at least to have this appraisal made,
and when the Commission refused to make it I then sought
have a judicial adjudication of the matter, so that the question of
ture payment under that contract could not be raised.
Q. Didn't you take the position at that time that you could not
o ahead with your contract until those lands were appraised?
A. Well, I do not remember that I made that specific statement,
ut I know as a matter of fact I felt dubious, and in as much as they
ere unable at that time to fix definitely the bulkhead owing to
is prospective government canal. I thought we could "Make hay
hile the sun shone" and fix that branch of our contract for safety
rposes.
Q. That is you felt very dubious whether you could proceed with
ur contract until the lands were appraised?

A. Well, yes. I was a little doubtful whether the lien might no be attacked. I did not want to get into litigation with those me after I did the work. I did not want to be challenged about th right to enforce the lien; and some persons might construe the la that way and they might refuse to buy the scrip when it was issue by the state.

Q. And you presented, did you not, to the State Board of Lan contract until they appraised those lands?

Commissioners, your view that you could not go ahead with thi

A. Yes.

Q. You presented that view?

A. Yes.

Q. And they refused to appraise them, did they not?

107 A. Yes.

Mr. France: That is all.

The Court: Call the next witness.

Mr. Thompson: I want to identify these exhibits that couns brought out in cross examination. I will call Mr. Hunter.

(Witness excused.)

108 FRANK T. HUNTER, produced as a witness on behalf o plaintiff, being first duly sworn, testified as follows:

(Mr. Hays:)

Q. State your name and residence?

A. Frank T. Hunter, Seattle, Washington.

Q. What is the fact about your having at any time had an in terest in what is known as the Smith's Cove state contract?

Mr. France: I object to that as irrelevant, immaterial and in competent. I do not think it will be of any assistance to the cour

The Court: I do not see where this is material.

Mr. Thompson: The object of it, I apprehend, is Your Honor t show that he is the same person that is mentioned in that contrac That instrument that was brought out in cross examination b counsel, and was not referred to before that, and these contract were identified. We desire to show both that after they were en tered into that they held some communciation with the Land Com missioner and a letter was received from him which showed his a titude towards this contract.

The Court: If that is the purpose, he may answer. It is alread established that he had a contract here.

(Mr. Hays:)

Q. State what that is, Mr. Hunter (showing)?

A. That is a bill of sale of the Smith's Cove contract to O. D Colvin.

Mr. Hays: I understand Your Honor, that it is not necessary t go through all that.

The Court: We do not care to take the time as to that. You can show whatever you will want to show by this man
109 with relation to the Land Commissioner.

Mr. Hays: I just want to identify this paper.

(Document marke "Plaintiff's exhibit No. 22 for identification.")

(Mr. Hays:)

Q. Mr. Hunter, who, if anyone, was associated with you in that transaction?

A. Well, I was rather associated with O. D. Colvin. It was taken with him and I became his associate.

Q. What was your business or official position in connection with the Seattle Car Company, if any?

A. I had no official connection with it. I was a stockholder in the company and helped to organize it.

Q. Mr. William Piggott is President?

A. Yes.

Q. And Mr. O. D. Colvin is vice president?

A. Yes, and general manager.

Q. Where is Mr. O. D. Colvin now?

A. He is on his way to American from Russia.

Q. Their business is what?

A. Building cars and repairing cars and trucks and logging equipment.

Q. What did you do, if anything, with the others, towards disclosing the fact that you were the owners of the contract in which you sought them to cooperate with you?

A. I addressed a letter to the Port Commission in connection with the proposition that we wanted to proceed with the work.

Mr. Hays: Mr. France, have you the original letter referred to by the witness?

Mr. France: I have not.

(Mr. Hays:)

110 Q. I will ask you to examine this for the purpose of identification, and state what it is?

A. I have not read it, but it looks like a carbon copy of the letter addressed to them—I wrote the letter.

Q. And you signed the letter?

A. I did.

Q. Is this signed?

A. It is not.

Q. The one that this is a copy of and was addressed, was that delivered through the mail, or in what way was that letter communicated to this defendant?

A. I have forgotten.

Q. Did you receive any answer or reply to that letter?

A. I did not. I do not remember whether Mr. Colvin ever did or not.

(Letter identified by the witness is marked "Plaintiff's exhibit No. 23 for identification.")

Q. Please examine this carbon copy and tell the court what it is (showing)?

A. This appears to be a copy of a letter received by Mr. Colvin.

Mr. Hays: I have the original here. (Showing.)

The Witness (continuing): A letter received from you, addressed to Mr. Colvin and myself with reference to a letter which we have evidently addressed to you, or Mr. Colvin directed to you, asking the legal effect of "House Bill No. 478—attempted vacation of the State's waterway at Smith's Cove."

Q. At the time this letter was addressed, you were the
111 owner of this contract, were you not?

A. Yes sir.

Mr. Hays: I wish to have this letter introduced—being a letter from the witness to the defendant.

Mr. France: I object to this as irrelevant, immaterial and incompetent, and I further object to the letter between these parties as not binding upon us. They are introducing letters between themselves.

The Court: They are simply identifying them.

Mr. Hays: I just wanted to have it identified.

(Document marked "Plaintiff's exhibit No. 24 for identification.")

Mr. Hays: I also offer this letter of November 30, 1896, from W. T. Forrest, Land Commissioner, to W. F. Hays.

(Document marked "Plaintiff's exhibit No. 25 for identification.")

Q. Now Mr. Hunter, you say you received no answer to that letter you addressed to the defendant the Port of Seattle?

A. I did not.

Q. And then later you reassigned this contract; state what your reasons were for turning back this contract?

A. Turning the contract back to you?

Mr. France: I object to that as irrelevant, immaterial and incompetent.

The Court: Objection sustained.

Mr. Hays: I have charged——

The Court: I do not *hear* to hear from you upon it. We do not care why he turned it back; all we are concerned with is whether you own it now, or not. Proceed.

112 Mr. Hays: Pardon me this suggestion; but I have charged in this bill that there was a conspiracy between the railroad company and the defendant, the Great Northern Railway Company and the Port of Seattle in the passage of this law, by which this waterway should be eliminated.

The Court: I do not care to hear from you. You stated that you turned it back because of that bill.

(To which ruling plaintiff excepts, which exception is allowed.)

Mr. Hays: I want to show that the railroad company positively aid things which would prevent the parties from going on with the ontract. It is only an element to show the possibility of the con-piracy that is alleged in the bill; of course I realize it is only frag-entary, but it is an element worthy of consideration at least.

The Court: Proceed with the cross examination.

(To which ruling plaintiff excepts, which exception is allowed.)

Mr. France: We have no cross examination.

(Witness excused.)

P. D. HAMLIN, produced as a witness on behalf of Plaintiff, being first duly sworn, testified as follows:

(Mr. Thompson:)

Q. State your name?
A. P. D. Hamlin.
Q. What is your profession?
A. Civil engineer.
Q. How long have you been practicing your profession as civil gineer?
A. Something over thirty years.
Q. Do you recall the time when, if at all, you were employed by . Hays in connection with this Smith's Cove improvement—en was that Mr. Hamlin?
A. About 1896.
Q. What do you know, if anything, about the preparing of plans f specifications for that improvement?
A. I prepared plans and drew up the specifications.
Q. Will you look at these plans and maps and say whether you identify them? (Showing.)
A. This is a blue print entitled or marked "Exhibit A."
Q. What does it represent?
A. It shows the general extent of the contract—it is a map show-the section of the country where——
Q. The general extent of the proposed improvement?
A. Yes.

(Document marked "Plaintiff's exhibit No. 26 for identification.")

Q. And what is this next exhibit (showing)?
A. A blue print of bulkhead plans entitled "Bulkhead A."

(Document marked "Plaintiff's exhibit No. 27 for identification.")

Q. And what is the next?
A. The one I hold in my hand is a blue print of the bulk-l, plan "C" and bulkhead plan "D."

(Blueprints marked "Plaintiff's exhibit No. 28 for identification.")

Q. What is the next exhibit you have there?
A. Blue print, bulkhead plan "E."

(Blueprint marked "Plaintiff's exhibit No. 29 for identification.")

Q. What is the next exhibit you have?
A. This seems to be a copy of the tide land plat that was obtained from Olympia by Mr. Hays.
Q. Is that the plat which you made originally?
A. No sir.
Q. This a certified map——
A. —of the tide land plats.
Q. Is this all one plat—different sheets?
A. Different sheets.
Q. Taken together they form the plat?
A. Yes.
Q. —exhibiting the waterway and the general improvement?
A. Yes.

(Marked "Plaintiff's exhibits No. 30 for identification.")

Q. After you had prepared these blue prints and these plans and specifications, etc., which you referred to, what other work, if any, did you do for Mr. Hays in connection with that improvement?
A. I oversaw the work that was done on the ground.

Q. Just tell the court what you proceeded to do, if any-
115 thing, at any time in connection with your employment as his engineer?

A. Well, simply directed things that were being done.
Q. What work did you do—what service did you perform?
A. A contract was entered into by Mr. Hays to have certain work performed, driving piles and construction of bulkheads.
Q. Do you remember when that work began?
A. You mean the identical day?
Q. Yes.
A. May 4, 1896.
Q. You began the work on May 4, 1896; now what was the work that was actually being done at that time, the character of the work?
A. At that time the work being done was the driving of piles—driving piles for the bulkhead.
Q. Did you have a pile-driver assembled there?
A. There was a pile-driver with the proper paraphernalia.
Q. And the piles also?
A. The piles.
Q. How far had you proceeded, if any, when you were stopped, or if you were stopped?
A. As I recall it, we had driven about ten piles.
Q. Do you recall what day you were stopped, whether it was the 4th or the next day after or when?

A. I could not say positively. My recollection is that day, the
th day of May.
Q. That you were stopped on the same day that you began?
A. The same day that they began to drive.

16 Cross-examination.

(Mr. France:)

Q. Do I understand you to say that you were driving the piles your-
lf, Mr. Hamlin?
A. No sir; I did not say so. I said that I was directing the work
hat was being performed by the contractor that Mr. Hays obtained
o drive the piles.
Q. You were there?
A. I was there looking after the work.
Q. Was there any work done on the 5th of May?
A. I am unable to say; I do not recollect.
Q. Was there any done on the 3d of May?
A. My recollection is that they assembled the piles and got their
river in readiness to proceed the next day.
Q. On the 3d of May you say there was something done?
A. I say that the contractor assembled his paraphernalia, his piles
nd pile-driver and got them in shape to begin the work of driving
he next day, the 4th day of May.
Q. And they started the actual driving on the 4th?
A. On the 4th day of May.
Q. But you do not know whether they did anything on the 5th?
A. I do not recall positively.
Q. Where were those piles driven?
A. On the north line—the northwesterly line of Milwaukee Ave-
ue, right west of the then existing track of the Seattle & Montana
ailway Company.

Mr. France: I think that is all.

(Mr. Thompson:)

Q. I will ask you to state whether you were driving those
17 in conformity with these plans and specification?
A. That was what I was doing, yes sir.

(Witness excused.)

18 PAUL P. WHITHAM, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Mr. Hays: Before passing from the present exhibits of bulkheads,
will ask Your Honor to allow us to supply Bulkhead "B" which
ems to have been mislaid.
The Court: Proceed.

(Mr. Hays:)

Q. State your name to the Court?
A. Paul P. Whitham.
Q. And your residence?
A. Seattle.
Q. How long have you resided in Seattle?
A. About twelve years.
Q. What is your business or vocation?
A. Civil engineer.
Q. What relation, if any, did you ever bear to the Port of Seattle as the Commission—your official career?
A. Engineer.
Q. How long were you engineer of the Port of Seattle?
A. Pretty nearly three years.
Q. Are you familiar with the work that has been done by the Port of Seattle in connection with what is known as the Smith's Cove Waterway?
A. Yes sir.
Q. Tell the court briefly in a general way what the Port of Seattle has done with reference to changing the condition of the Smith's Cove Waterway from what it was originally before the work of the Port was begun?
A. South of Garfield Street they excavated some material, some portion of which was deposited on a portion of the waterway
119 north of Garfield Street.
Q. About what extent of transposition of this earth was made; in cubic yards, if you can remember?
A. Well, I do not remember what proportion was put in—was deposited in the waterway north of Garfield.
Q. What fill, in the way of depth or height, was made in the waterway from Garfield Street north?
A. Well, a portion of the waterway was brought up to the level, as I recollect, of about five feet above city datum.
Q. Would that be above high line of high tide?
A. City datum is approximately high tide.
Q. What work, if any, was done by the Port of Seattle with reference to building a bulkhead, or other obstruction, across the waterway at Garfield Street or at any other locality?
A. A temporary or brush bulkhead was built across, approximately the line of Garfield Street across the waterway.
Q. What would be the expense of removing that bulkhead, per foot?
A. I could not say; I did not figure it.
Q. Have you ever had any experience in the removal of a bulkhead of the samd kind?
A. Well, I have removed some bulkheads, but I never kept the cost of it separate, and I do not know what it would be.
Q. What would be the width of that obstruction which is put in there?

A. Well, I believe it is the full width of the waterway,
120 400 feet.

Q. And do you recall how many piles there were driven, nd the distance apart—three or two—for this bulkhead—I mean n width—not the length, but the width?

A. You mean the width?

A. Yes.

A. My recollection is that it was what we call a three-pile bulk- ead.

Q. And driven about how deep?

A. I could not say as to that, not so very deep.

Q. Large piles?

A. Not very long, possibly not over 40 feet.

Q. And the brush that was put in in the form of mattresses, was t fastened down by weights and the earth thrown in upon it?

A. Well, it was just laid in, as I understand, by hand, without ny particular arrangement to fasten it.

Q. What, if any, bulkhead was placed alongside this waterway here this excavation of the earth was done?

A. Well, there was a bulkhead—the bulkhead was not placed long the margin of the waterway, it was some distance back,

Q. Placed some distance back from the margin of the waterway?

A. Yes.

Q. What character of bulkhead is it?

A. Sheet piling or timber.

Q. Any brush?

A. No, timber.

Q. What do you call sheet piling?

A. What we call timber-sheet piling.

Q. And that is not on the line of the waterway?

121 A. No.

Q. Could you give an estimate of about what distance hat waterway was excavated?

A. You mean what area?

Q. I suppose it was 400 feet wide?

A. Yes.

Q. Now what area in length?

A. Approximately, I would say, between sixteen and seventeen hundred feet.

Q. And all the earth from that was taken, except the earth which as thrown on the side, to fill in the lands on the side of the water- ay, was transferred to the other end of the waterway and raised he end of the waterway to the north up a distance of five feet, as ou testified?

A. Yes, I believe that was all used that way.

Q. What would be the length of that fill at the other end of the aterway?

A. North of the fill?

Q. From the bulkhead, where it crosses the waterway and where he fill was made, above that to the north?

A. I could not say; it extended several hundred feet, but I could ot say.

Q. What is the full length of that waterway?
A. To my recollection it was approximately a mile.
Q. But all the rest of the waterway that was not excavated filled in, was it, or practically so?
A. No. There was—well, it didn't cover all of it.
Q. Do you recall how much less than the entire waterway?
A. I would not like to say definitely; possibly half or a li more.
122 Q. More than half was filled in?
A. I cannot say definitely.
Q. What was the cost to the Port, if you know, of the transfer the pumping of the earth—that was all done by hydraulic dredgi as I understand?
A. Yes.
Q. What was the cost per cubic land for transferring the ear
A. I do not remember the exact figure.
Q. Can you give about the cost?
A. It was in the neighborhood of nineteen cents.
Q. Does that include the bulkhead expense?
A. No.
Q. That was independent of the bulkhead?
A. Yes.

Mr. France: We have no cross examination.

(Witness excused.)

123 W. F. HAYS, Plaintiff, recalled, testified:

(Mr. Thompson:)

Q. Mr. Hays, when this filling began, and while it was in ope tion by the Port Commission, I will ask you if you discussed question with the Port Commission or the members thereof?
A. Well, no, not particularly. I was one day present when meeting was being held at which Mr. Bridges and Mr. Chitten and Mr. Remsburg were all present.
Q. Members of the Port Commission?
A. Mr. Chittenden was chairman at that time. He said, in c nection with a discussion with reference to the cost of remov certain bulkheads, that it would cost $9.50 a running foot; that a brush and piles bulkhead, such as the one which has been testi about here.
Q. Anything further with reference to excavation or filling?
A. No, no statement.

Mr. Thompson: We will rest, if Your Honor please.

(Witness excused.)

Here the plaintiff rests.

Mr. France: At this time we desire to move for a nonsuit judgment, upon the ground that the complainant has established

grounds for equitable relief in this action. If Your Honor will examine the complaint, it does not appear even in his complaint, that he has asked for any relief that Your Honor can give him. He alleges here that he entered into a contract in the year 1896, and he has proven that from the year 1896 until the year
124 1903 he did have certain negotiations and correspondence with the then state officials, regarding this contract, but he has introduced no written evidence, and I think he has not introduced any oral testimony which I heard to the effect that from the year 1903 until the year 1914, he has ever done anything or attempted to do anything in reference to this contract whatsoever.

Mr. Thompson: I would like to ask counsel—I was unfortunate in not hearing the commencement of the motion—what motion are — making—nonsuit or dismissal?

Mr. France: For a nonsuit.

Mr. Thompson: I would like to ask counsel if he has rested his case?

Mr. France: No.

Mr. Thompson: Then I shall object to the entertainment of the motion, unless counsel says that he rests his case.

The Court: I think I should hear all the evidence. I might say that you have not offered these exhibits in evidence.

Mr. Thompson: I was going to offer them all in evidence seriatim.

The Court: Suppose you do that now. Some of these I suppose are not material and some the court will consider, but I will pass upon the whole business when I pass upon the case.

Mr. France: It will be understood then that I object and my objections go to all of them.

Mr. Thompson: I am willing to have counsel have several objections to each of them and they will be considered in evidence at the present time.

125 Mr. Dorety: In behalf of the Seattle & Montana Railway Company, named as a defendant in the action, I would like to move for a judgment of nonsuit. There has been no mention of that company in the evidence so far. It is alleged that we are conspiring with the Port Commission to interfere with the plaintiff's rights, and so far as I have heard so far he has not alleged that we are the Port or the State or any body else or threatening to do him any wrong.

The Court: Mr. Hays made some suggestion that he was going to show something by Mr. Hunter——

Mr. Thompson: I am frank to say that——

The Court (continuing): —that the railroad conspired to pass the Act; whether he means that——

Mr. Thompson: For another reason, I have just been called into the case, but I made as rapid an examination as I could of it, and not only from the state of the pleadings themselves, but from my knowledge of the history of the Seattle & Montana Railway Company, I advised Mr. Hays that there was no cause of action against them, and we agree to dismiss the case as to them. There is no cause of action against that company.

The Court: Let it be so ordered.
Mr. Dorety: It is understood that we have our costs in the action
Mr. Thompson: Whatever the law gives you.
Mr. Dorety: I wanted to avoid putting myself in the position consenting to a voluntary dismissal without costs, that is all.
The Court: Yes, the motion to dismiss is granted.

126 *The Defense.*

127 MAUD S. TAMBLIN, produced as a witness in behalf of th Defendants, being first duly sworn, testified as follows:

(Mr. France:)

Q. State your full name?
A. Maud S. Tamblin.
Q. What is your present occupation, Miss Tamblin?
A. I am clerk in the office of the Commissioner of Public Land acting as secretary of the Board of State Land Commissioners.
Q. You are the secretary of the Board of State Land Commi sioners?
A. Yes sir.
Q. How long have you held that position?
A. I have been secretary for about eight years. I have been cler altogether, about thirteen years.
Q. You have been in the office altogether about thirteen years?
A. Yes.
Q. And as such acting secretary you have charge of the record and files and letters in the office of the State Land Commissioner?
A. Yes sir.
Q. You have brought with you various original letters and fil relating to this contract with Mr. Hays, have you not?
A. Yes sir.
Q. I show you this letter under date of May 2, 1896, being a lett from Mr. Hays to Mr. Forrest; is that one of the original letters i the files?
A. It is one of the original letters found in the files.

128 Mr. France: I offer this for identification.

(Document marked "Defendants' exhibit B for identification."

Q. I show you a letter under date of May 4, 1896, from Mr. Hay to Mr. Forrest.
A. This is an original letter from the files of the office, dated Ma 4, 1896.

(Document received in evidence without objection and marke "Defendants' exhibit C.")

Q. I show you this letter from Robert Bridges to W. F. Hay dated June 5, 1897.
A. This is an original letter from the office files.

(Document received in evidence without objection and marked "Defendants' exhibit D.")

Q. I show you this letter under date of June 9, 1897, being a letter from Hays to Bridges?
A. This is also an original office letter.

(Document received in evidence without objection and marked "Defendants' exhibit E.")

Q. I show you a letter to Mr. Hays from Robert Bridges, dated November 17, 1898?
A. This is a carbon copy of the letter, but it is signed by Mr. Bridges. Those carbon copies were all signed by Mr. Bridges in those days.
Q. That is a carbon copy of the letter?
A. Yes sir, a carbon copy.

(Document received in evidence without objection and marked "Defendants' exhibit F.")

129 Q. I show you a letter dated December 2, 1898, from W. F. Hays to Robert Bridges?
A. That is an original letter.

(Document received in evidence without objection and marked "Defendants' exhibit G.")

Q. I show you a letter under date of December 17, 1898, from Hays to Robert Bridges?
A. That is an original in the files of the office.

(Document received in evidence without objection and marked "Defendants' exhibit H.")

Q. I show you a letter under date of October 29, 1903, from Hays to Calvert.
A. That is an original letter from the office files.

(Document received in evidence without objection and marked "Defendants' exhibit I.")

Q. I now show you a letter under date of October 31, 1903?
A. That is an original from the office files.

(Document received in evidence without objection and marked "Defendants' exhibit J.")

Q. I should have said that defendants' exhibit "J," being a letter dated October 31, 1903, being a carbon copy of a letter from Calvert to Hays.
A. Yes.
Q. Those are the original files?
A. Those are the original files.
130 Q. I show you defendants' exhibit "K" for identification,

being a communication from W. F. Hays to Clark V. Savidge, dat November 12, 1914?

A. That is a copy and this is the original. (Showing.)

(Document received in evidence without objection and mark "Defendants' exhibit K.")

Q. I will ask you if you have examined all of the files in the offi of the State Land Commissioner relating to this contract, M Tamblin?

A. Yes I have.

Q. Is there anything in writing from Mr. Hays subsequent October 29, 1903, being the letter which I introduced as defendan exhibit "I," up to November 12, 1914, being defendants' exhi "K"?

A. I could find nothing. I made a thorough search and I cou find nothing.

Q. You found no writing between the dates of October 23, 190 and November 12, 1914, from *May* Hays?

A. Nothing from Mr. Hays.

Q. Relating to this contract?

A. Relating to that contract.

Cross-examination.

(Mr. Thompson:)

Q. Did you make these copies?

A. I had them made under my direction.

Q. You approved them and say that they were correct?

A. Yes.

Q. Now, where is the other sheet or sheets belonging to th (Showing.)

131 A. Well, I did not bring these copies with me. I do know where the other sheet is.

Mr. Thompson: I will ask counsel where the other sheet is—t is the one which you withdraw.

Mr. France: I can find it for you later on.

Mr. Thompson: I want to introduce it when you get throu

Q. You say you did not bring these copies here?

A. Not this time.

Q. You only made them and turned them over to somebody el

A. Yes.

Q. Who did you turn them over to?

A. Mr. Preston.

Q. To be transmitted to the counsel here?

A. Mr. Preston was the one who received them from us.

Q. And you made only copies of such originals as you had p sented before you?

A. Yes.

(Witness excused.)

132 A. H. GILLIS, Produced as a witness on behalf of the Defendants, being first duly sworn, testified as follows:

(Mr. France:)

Q. State your full name?
A. A. H. Gillis.
Q. What is your business?
A. I am an attorney at law.
Q. You were at one time employed by the State of Washington?
A. Yes sir.
Q. When was that and in what capacity?
A. I think it was -bout the years 1892 to 1896.
Q. You were at that time chief engineer under W. T. Forrest, who was Land Commissioner?
A. Yes sir.
Q. Did there come under your supervision the contract and specifications referred to herein?
A. I do not think that I had anything to do with the contract.
Q. What did you have to do with?
A. I had to do with the engineering features of the work, that is, in connection with the Smith's Cove Waterway. I do not remember just when, but there were some plans submitted to the office and were referred to me.
Q. They were plans and specifications prepared by Mr. Hays and were submitted to you?
A. They were furnished by Mr. Hays, I believe.
Q. And did you make any recommendation as to the character of the bulkhead which should be made there at Smith's Cove Waterway?
A. Yes.
133 Q. What recommendation did you make?
A. Why, I recommended that a stone bulkhead or sea wall be used at Smith's Cove.
Q. That was contrary to the plans and specifications that were in the contract with Mr. Hays?
A. It was different in this, that the plans submitted contemplated the use of wooden structures for retaining the embankment.
Q. Now, what was your reason for recommending the stone bulkhead, Mr. Gillis?
A. I regarded it as more substantial, more durable and more suitable material to be used. My experience with stone had led me to think that that was none too good, and under all the conditions in the case I did not think that a facine structure was at all suitable for that work.
Q. You were an engineer at that time practicing, before you became an attorney at law?
A. Yes.
Q. And what experience had you had in engineering work at that time?
A. What year do you refer to?

Q. To 1896?
A. Well, I think at that time that I had about nineteen years.
Q. Engineering experience?
A. Engineering experience, yes sir.
Q. Now, what were the conditions existing at Smith's Cove that
you to conclude that there should be a stone bulkhead substitut
for the wood and brush specified?
A. The depth of water there and the exposure to the wi
134 and sea.
Q. What was the depth of water where the bulkhead was
be built?
A. That is purely a matter of memory with me, and that has b
some time ago, but as my recollection goes, it was upwards of
feet of water.
Q. And what were the conditions as to the exposure at that tim
A. Well, it was exposed to the southwesterly winds, probably
posed to the prevailing winds——
A. That portion of the Bay known as Smith's Cove Waterw
faces up towards the Sound?
A. Yes.
Q. Quite open water there?
A. Yes, sir, for quite a long distance out across there.
Q. Do you recall coming to Seattle to meet Mr. Hays on one
casion in reference to this bulkhead which should be built?
A. Yes.
Q. Were you instructed to come here to meet him, by your
perior, Mr. Forrest?
A. Well, I had directions from the office to come, yes.
Q. And you did come here to meet him by an appointment?
A. Yes sir.
Q. To take up the question?
A. That is, I presume it was by an appointment. I was instruc
to come here for the purpose of meeting him, and I supposed it
by appointment.
Q. Where were you to meet him?
A. I think it was the Butler Hotel then in the c
135 Q. Did he meet you at that time?
A. No.
Q. He did not meet you—did you see him at all?
A. Not on that trip, no sir.
Q. Do you recall just what time of the year that was; was it
or June or July, 1896?
A. No, I do not, I could not say.
Q. But it was about the time that negotiations and correspo
ence were passing between Mr. Hays and Mr. Forrest respecting
bulkhead, was it not?
A. Yes, it was about the time there was considerable talk in
office with reference to these matters, and, of course, this correspo
ence between Mr. Hays and Mr. Forrest I do not think was
mitted to me. I think that related more to the contract and m
to the legal effect.

Q. But it was at the time that there were conversations and agitation regarding the change in the bulkhead in the office, that you went up there?

A. Well, it was about the time of the discussion of these various plans.

Q. And that was sometime in 1896?

A. Yes, in 1896, or prior to that time.

Q. I will ask you whether or not at the time you came here to see Mr. Hays, you went out to look at the Smith's Cove Waterway?

A. I do not know whether I did or not at that time. I came here on one occasion to go out there and see what work had been done.

Q. And did you go out there?

A. Yes, I went out there.

136 Q. Was that about this same time?

A. Well, it was at about the time this discussion generally regarding the bulkhead was up in the office.

Q. And you went out to see what work had been done?

A. Yes, sir.

Q. What did you find?

A. I did not find any work that had been done.

Q. You could not find any work had been done?

A. No.

Q. Did you see any piles which had been driven there?

A. Well, there were piles driven at various places around over the Bay, but there was nothing that I remember that indicated any continuous work of any kind.

Q. What would you say as to those piles which had been driven in various places over the Bay, where they recently driven?

A. No; some of them were new and some old ones, and some more or less rotten.

Q. Scattering piles?

A. Yes.

Q. Did you ever have any conversation with Mr. Hays regarding this matter?

A. Why, I do not recall. I think very probably I had. My recollection is that he was in the office a number of times when I was there.

Q. You always took the position that there should be a stone bulkhead?

A. Yes.

Q. And if you had conversations with him is that the position which you took with him?

137 A. That, assuredly, was my position with reference to that improvement.

Q. Was that position ever receded from or changed during the time that you were engineer?

A. No. No, I had never changed my mind in regard to that.

Q. Did Mr. Forrest accede to your opinion regarding that bulkhead?

Mr. Thompson: We object to what he says he acceded to—he can state what Mr. Forrest said.

Q. Did you have any conversation with Mr. Forrest as to the bulkhead?

A. During the time I was in the office?

Q. Yes.

A. Yes sir.

Q. What did he say to you as to your opinion?

A. My recollection of Mr. Forrest's position in the matter, is that he took the position that he was not an engineer and did not make any pretense to understanding those matters, and that he left it to my discretion.

Q. He followed your opinion on it then?

A. Yes sir.

Cross-examination.

(Mr. Thompson:)

Q. Did you ever make out any plans and specifications for this bulkheads?

A. No sir.

Q. And you never saw any plans or specifications drawn in your office or by Mr. Forrest or anyone connected with them?

138 A. I do not think there were any plans prepared in the office of the Land Commissioner while I was there.

Q. Either for stone or concrete or steel or reinforced concrete or of any character?

A. No plans of any kind prepared in that office.

Q. As a matter of fact, you know, don't you, that Mr. Forrest later on absolutely refused to furnish any kind of plans or specifications?

A. No, I do not know that.

Q. Have you looked over those letters which counsel has offered in evidence here?

A. I think I saw some copies this morning, but I only read two or three of them.

Q. At any rate, you do not think that any plans and specifications ever were prepared for stone or any other kind?

A. You mean in the office of the State Land Commissioner while I was engineer there?

Q. Yes.

A. No sir.

(Witness excused.)

139 J. J. CRYDERMAN, produced as a witness on behalf of defendants, being first duly sworn, testified as follows:

(Mr. France:)

Q. What is your full name?

A. J. J. Cryderman.
Q. What is your business, Mr. Cryderman?
A. Civil engineer.
Q. How long have you been engaged in that business?
A. Between twenty-five and thirty years.
Q. Were you at one time chief engineer of the State Land Commissioner's office of this state?
A. I was, under Mr. Bridges.
Q. Under Robert Bridges?
A. Yes sir.
Q. What year was that?
A. From January, 1896, to the spring of 1900.
Q. Were you asked to pass upon the character of the bulkhead which should be constructed at the Smith's Cove Waterway under what is known as the Hays contract?
A. I was.
Q. Did you make an investigation as to what character of bulkhead should be made?
A. I did.
Q. And what did you recommend?
A. I recommended that a stone wall of some character be used as a retaining wall for the fill.
Q. What did the contract provide for, that Mr. Hays had?
A. Well, the plans and specifications on file, as I recall, provided for a pile and brush bulkhead.

Q. What led you to recommend the change from the pile
140 and brush to the stone bulkhead, Mr. Cryderman?

A. The fact of the depth of water at that point, the exposure, and my observation on the Sound of the effect of the water on other bulkheads which had been built along the Sound of a similar character to the brush and pile bulkhead.
Q. What had been your observation and experience of the brush and pile bulkhead under similar conditions as those found at this point?
A. I had never seen it under quite as adverse conditions as would occur, but in places where it was even more favorable, it would not stand the storms that destroy bulkheads of that character.
Q. What then, in your opinion, would have been the effect if the pile and brush bulkhead had been constructed at that point, and work had been done on that in dredging out that waterway with such a structure?
A. I think the result would have been that the bulkhead itself would have been torn out by the storms, and the fill would have been washed down until it took a natural slope in the water, which would have been about, from my observation, would have been about a ten-to-one slope—the ordinary slope of an ordinary earth fill is about one-and-a-half to one.
Q. In other words, the storms would wash the bulkhead out and——
A. —And it would flatten it down.

Q. And the material would slope off there on a one-to-one slope?
A. To a ten-to-one slope.
141 Q. In the portion of the waterway which was dredged out?
A. Yes.
Q. Did you make those recommendations to Mr. Bridges, your superior?
A. I did.
Q. And what did he say regarding your recommendation?
A. Well, as to that I have no means of knowing. He simply asked for my opinions and I gave them to him.
Q. What did he say to you regarding them?
A. Well, he simply asked me for my opinion as to the character of bulkhead, and I gave it to him, and as I recall it, he made no particular comment.
Q. Did you ever change that opinion during the time that you were engineer of the commission?
A. I did not.

Cross-examination.

(Mr. Thompson:)

Q. Did you ever have any experience yourself, with building bulkheads or brush and earth supported by piles?
A. Not personally; I have simply observed the work of other men.
Q. You have examined a great many of them?
A. Not a great many.
Q. Did you ever examine those *grate* bulkheads built in that way by Eads at the mouth of the Mississippi?
A. I have not.
Q. You knew, as a matter of fact, as an engineer, from
142 reading reports, that they were built that way at the mouth of the Mississippi?
A. Yes sir.
Q. Where the whole sweep of the winds from the Gulf come against them?
A. Yes.
Q. And they are there today and serving the purpose?
A. I think they were reinforced by rock.
Q. There was no rock wall built, or anything of that kind?
A. It was riprap.
Q. Have you any knowledge of that fact?
A. No sir.
Q. All the bulkheads built in Seattle Harbor for the filling of the tide flats has been carried on here for years and years, was simply piles driven and brush thrown down and weighted and covered with earth, were they not?
A. Yes sir.
Q. And they maintained this perfectly, didn't they?
A. They do, in the position where they are.
Q. In the position where they are—now the only reason on earth that you thought that it would be different up here was because you

think the bitter winds from Tacoma would have more effect on them than the winds coming from the other direction?

A. And it was a greater depth of water there.

Q. It was not all of a greater depth?

A. The portion that I recommended was.

Q. There is practically a mile square of that ground up there that the deepest water is not over ten feet?

A. On the inside, but not on the front.

143 Q. Not on the other front?

A. Not on the other front.

Q. That is the only place where you recommended the stone wall?

A. That was the place.

Q. Did you draw any plans or specifications?

A. I did not.

Q. Were you asked to?

A. I was not.

Q. Did you ever know of any being drawn?

A. I did not, as we made no plans or specifications for anything of that kind in the office.

(Mr. France:)

Q. Did you ever see this Smith's Cove Waterway after you were engineer, did you go up there?

A. I passed it repeatedly.

Q. I will ask you whether there was any work done there that you saw?

A. There was none—of course there was scattering piles driven all over this Bay, but I saw no evidence of any bulkhead or anything of that kind.

Q. You did not see any evidence of it?

A. No.

(Mr. Thompson:)

Q. There were hundreds of piles standing driven in that region?

A. There were.

Q. And some of them were in rows and some of them scattered indiscriminately, apparently?

A. They were.

Q. And which, if any, had been driven under Mr. Hays' administration, you do not know?

144 A. I absolutely could not tell.

(Witness excused.)

145 ROBERT BRIDGES, produced as a witness on behalf of Defendants, being first duly sworn, testified as follows:

(Mr. France:)

Q. Your name is Robert Bridges?

A. Robert Bridges.

Q. You are one of the members of the Port Commission of th defendant, the Port of Seattle?

A. Yes sir.

Q. And you have been such since its organization?

A. Yes sir.

Q. You were also at one time State Land Commissioner?

A. Commissioner of Public Lands.

Q. And when was that, Mr. Bridges?

A. From sometime in January, 1897, until January, 1901.

Q. You recall the letters which have been introduced here whic passed between yourself and Mr. Hays?

A. Yes, I recall some of them.

Q. Referring to plaintiff's exhibit number "11" (showing); i that letter you informed Mr. Hays that the plans and specification for a bulkhead as provided for in his contract were wholly impract cable, or something of that kind, didn't you Mr. Bridges?

A. The plans for a retaining wall, utterly impracticable and with out merit.

Q. And you also state- to him that he should prepare plans an specifications for a stone bulkhead?

A. Yes.

Q. It was your position at that time under the law, was it no Mr. Bridges, that the plans and specifications in the changed for be prepared by Mr. Hays?

146 A. Should be prepared and furnished the office of th Commissioner of Public Lands by the parties holding th contract.

Q. Therefore, when you informed him that the stone bulkhea should be built and asked him to submit specifications, you felt tha your duty was fully complied with under the law?

A. Yes sir.

Q. Did he ever submit any plans and specifications?

A. Not that I remember.

Q. Do you recall what Mr. Hays' answer was to you and to tha letter?

A. It is sometime ago since these things took place.

Q. I show you defendants' exhibit "G," which purports to be a answer to your letter of November 17th, does it not?

A. Yes sir, I remember that letter.

Q. In that letter to you, in response to your demand that h prepare plans and specifications for a s-on*e* bulkhead, he states tha such a bulkhead as you propose would result practically in confisca ing the property that would be subject to the lien, did he not?

A. Yes; that is stated there in the answer.

Q. Now, I will ask you whether or not after that time anythin passed between you and Mr. Hays regarding the bulkhead, o whether you considered it a closed incident so far as the bulkhea was concerned?

A. So far as the bulkhead or the character of the bulkhead, I d not recall any further communications on that subject from me a Commissioner of Public Lands.

147 Q. You heard the testimony of Mr. Hays, that pursuant to your letter to him of November 17, he had a meeting in Olympia at which you were present, Governor Rogers was present and Attorney General Vance was present—was there ever any such meeting held?

A. Mr. Hays visited my office while Commissioner of Public Lands, a number of times. There was at no time any conference held at which the late Governor Rogers was a member of the conference. It was not one of the Governor's duties, nor was he a member of any Commission that had anything whatever to do with the question of the character of the bulkheads. Mr. Vance, as Assistant Attorney General, was called in very frequently upon matters where there was any legal questions involved; in fact upon all matters where legal questions were involved. But I cannot recollect any conference in reference to this matter in which the late Governor Rogers was a member of the conference.

Q. Did you ever recede from the position taken in your letter of November 17th, that a stone bulkhead would have to be required?

A. No sir.

Q. At or about this same time, *May* Hays began to insist on another feature rather than the stone bulkhead, namely, the North Canal, did he not, Mr. Bridges?

A. Well, yes; he discussed a great many matters of that kind. The question of the route of the canal was a matter that was under consideration, and reported upon by United States engineers on several occasions. The state was loath to go ahead with anything *would*

148 would in any way interfere with the construction of what is known as the Lake Washington Canal by the United States Government, or for the United States Government, rather. The matter of co-operation with the government in relation to the character of the retaining walls, was taken up by the departments; that is really the question at issue that was involved in the correspondence that passed between the office of the Commissioner of Public Lands of the state of Washington and the Secretary of War in relation to the character of the bulkhead or retaining wall which should be constructed in that narrow waterway. The Secretary of War very properly refused to pass upon any of the questions relative to the character of the bulkheads until such time as the route was finally determined, either by way of Smith's Cove or Shilshole Bay. After the determination by the government to use the route by Shilshole Bay, there was no longer any question at issue relative to the construction of the Smith's Cove Waterway from Smith's Cove to a connection in Salmon Bay.

Q. Now, in order that you can refresh your memory Mr. Bridges, I show you the correspondence that appears in the fifth bi-annual report of the Commissioner of Public Lands, which has been introduced as exhibit "12," on pages 77 and 78 (showing).

A. Yes sir.

Q. Can you tell from that correspondence just about what time it was, or about between what dates the proposed route between the

north end of Smith's Cove and Salmon Bay was abandoned, and t
route now completed, was taken up?

A. It evidently was sometime along in 1898, when t
149 route was finally determined by the United States Gover
ment—the Shilshole Bay route. As to the exact date,
could not say from memory, but the information was in the p
session of the Land Office at Olympia, and after the determinati
of the Shilshole Bay route the question of the approval of the W
Department of any other style of bulkhead, and their relation to
was eliminated.

Q. But prior to the time that you ceased to be Public Land Co
missioner, that North Canal route had been totally abandoned
the United States Government, and the other route adopted?

A. As a matter of fact, the Smith's Cove route never was adopt
by the United States Government. There were two routes und
consideration, or which the United States engineers reported on, a
the United States Government finally determined upon the Shilsh
route, but at no time was the Smith's Cove route a part of the La
Washington Canal as accepted by the United States Governme

Q. And that determination to take the Shilshole Bay route w
made during the time you were Land Commissioner and prior to t
time that Calvert succeeded you?

A. Yes sir.

Q. Now, Mr. Bridges, what improvement has the Port Comm
sion made on or adjacent to the Smith's Cove Waterway?

A. The Port Commission has constructed wharf there appro
mately 300 feet in width; excavated a portion of the waterw
known as the Smith's Cove Waterway, to a depth—that is a porti
in width as well as length—to a depth of water at low tide of a
proximately 30 feet, by driving sheet piling and the pumpi
150 by hydraulic machinery behind the sheet piling at a distan
of approximately 80 feet inside of the property line; that
inside from the waterway, and placing riprap, or rock on the face
about a slope of one-half-to-one, in order to protect it against t
heavy seas and the waves at that point. The riprap is about 16
feet in length on either side of the pier, and across the front the fu
width of the pier.

Q. You are familiar, are you not, Mr. Bridges, with the improv
ments made by the Great Northern Railway at or adjacent to t
Smith's Cove Waterway and included within the lands which wou
be filled by Mr. Hays' contract?

A. Yes.

Q. Just state, in a general way, what some of those improvemen
consist of?

A. A portion of the pier that is now used as the Smith's Co
Waterway, they started to use piling and brush bulkhead and afte
wards abandoned it and used riprap; in fact used riprap in front
and taking the place of the brush bulkhead that was formerly co
structed by the Great Northern at what is known as the Smith
Cove pier.

Mr. France: That is all, unless there is something further you wish to explain.

A. I might say, in connection with the operation and construction of the work in the harbor of Seattle, that the Port Commission has found that a bulkhead constructed by piling and brush, when the waterways are excavated to the width of a fairway necessary for ships to reach the docks, that it became necessary for us to remove
151 them and we did remove them, and have on each of our properties removed the former brush bulkheads because of their inability to retain themselves at anything near the depth of water necessary for a vessel to reach the docks; when the excavation takes place the bulkheads will not retain themselves in place, even where they are sheltered in the calm waters of the waterways referred to, a long distance from the Bay.

Q. I just want to ask you another question; about how far is it from the north end of Smith's Cove Waterway to Salmon Bay, along that contemplated route of the North Canal, approximately speaking?

A. A mile and three-quarters, probably.

Q. And that route now runs to properties, that is Seattle city property, a good deal of it, does it not?

A. Principally railroad yards, warehouses, industries, manufacturing institutions.

Q. Those railroad yards and industries and manufacturing institutions have been built up largely with- the last ten years, have they not, Mr. Bridges?

A. Some of them would date back twenty years, but principally in the last ten or fifteen years.

Q. From you- knowledge of the condition and situation there, would it be practicable or feasible for the United States Government or the State of Washington, ever to acquire a right-of-way across that route to the North Canal?

A. Anything north of Garfield Street would be very expensive, and no waterway constructed there would be justified under existing conditions.

Q. Has there ever been any proposal by anyone in this
152 state that you know of, since the year 1898, wherein it was proposed or contemplated ever to build a canal along that route?

A. Not to my knowledge.

Cross-examination.

(Mr. Thompson:)

Q. Mr. Bridges, it was known by you that the interest that Mr. Hays had and claimed in the construction of this canal, was merely, so far as he was concerned, to get the material to fill up the tide flats with, was it not?

A. The purpose of the contract in the first place was to dredge a waterway. That was the primary purpose by the state.

Q. But the contractor who was doing this work, the only value it was to him was to get the material, was it not?

A. The only value he could get from it would be the lien which might attach to the tide lands from the material displaced from the waterway.

Q. In other words, he could not get anything out of his contract unless he filled up the tide flats?

A. Unless it was filled up to the datum called for.

Q. And he had to have material to do that?

A. Yes.

Q. And there was not enough material in the waterway, within the water, itself, to fill the tide flats?

A. I could not tell you.

Q. You understood that, that was the reason he wanted the additional material?

153 A. The question of additional material was never brought up during my term of office.

Q. At any rate, so far as you know, that is the only value it would be to him, would be to get that material, so far as his contract was concerned?

A So far as his contract was concerned for the purpose of excavating the waterway a certain depth and of a certain cross-section.

Q. So that that would be the only value it would be to him, to get the material?

A. That is the only way he could get any return out of it.

Q. That is what I am trying to get at—to hurry these things through—now, you say that during your administration as Commissioner you were unwilling to have any bulkhead unless it was a stone bulkhead?

A. Yes.

Q. You know that you were succeeded as Commissioner by Mr. Calvert?

A. Yes.

Q. Did you ever follow up the correspondence after that with Mr. Calvert?

A. No sir.

Q. You do not know then whether along as late as November 1901, that Mr. Calvert was taking up the matter of the original character of bulkheads with Mr. Hays?

A. I do not know.

Q. You do not know anything about that?

A. No sir.

Q. You have not examined plaintiff's exhibit Number "13"?

A. No sir.

154 Q. Mr. Bridges, I call your attention to exhibit number "11"; you wrote that letter, did you not (showing)?

A. Yes sir, I believe that is right.

Q. And that was sent to Mr. Hays?

A. Yes sir.

Q. I do not care to read it all, but you closed up by saying "Within thirty days from this date you are hereby notified to submit plans and specifications and estimates according to the above instructions and to commence operations within ten days after the approval of

said plans and specifications and estimates by this Department, or show good cause why action should not be taken by the State for the annulment of this"——

A. Yes.

Q. That was your intention, to bring proceedings to annul his contract?

A. Yes.

Q. Did he show you any good cause why it would not be done?

A. No sir, not that I recollect.

Q. Did you bring suit to annul the contract?

A. Upon the advice of the Attorney General, the matter was dropped.

Q. Upon the advice of the Attorney General the matter was dropped—as a matter of fact, the Attorney General advised you at that time that Mr. Hays was not in default?

A. The Attorney General advised me at that time that the whole subject matter should be taken up by a committee of the Legislature, and there was a report being drawn up recommending that matter to the Legislature.

Q. And did you inform Mr. Hays that was being done?

155 A. I do not believe I did; I do not recall, but I did publish that in my published report.

Q. You published it in your published report?

A. Yes.

Q. So that you did not expect Mr. Hays to take any action until that matter was disposed of?

A. I did not *expert* anything of him but promises. My experience led me not to expect anything definite or certain except promises from Mr. Hays.

Q. I believe you stated that you did not know that late in the year 1901, Commissioner Calvert was going over this matter with reference to the character of the bulkheads to be furnished?

A. No sir, I did not.

Q. Well, all of the correspondence connected with your office was subject to your examination, was it not?

A. Oh my, no. There was lots of correspondence went through my office that I never saw.

Q. But it was subject to your examination?

A. Yes.

Q. Did you ever see that letter of Commissioner Calvert as part of the files?

A. I was not in the office; I had no occasion to be in the office since Commissioner Calvert took office.

Q. Answer my question; since that time have you ever seen it?

A. I never saw it.

Q. And as Port Commissioner, you never saw it?

A. No sir.

Q. Now, you say you proceeded to do some work and that

156 you have excavated a waterway 400 feet in width a long distance?

A. No, I said there was a partially constructed waterway both as to width and as to length.

Q. Well, how far—how long have you excavated it—what length?

A. About 1600 feet in the Smith's Cove Waterway proper, to a depth of approximately 30 feet.

Q. And what width?

A. A cross section of probably 200 or 250 feet across the waterway, leaving the natural slope on the opposite side so that it would form itself without breaking into or over the private property line which has no retaining wall.

Q. In other words, it is about that wide at the bottom as you described it, and it slopes, or you built it narrow enough so that its slopes would not extend out onto private property?

A. So that it would not break down or injure private property.

Q. But is something like 200 or 250 feet in width?

A. The cross section may be about 200 or 250 feet.

Q. And in addition to this $1600 feet, as deep as you have described and as wide as you have described, you had done some other work by the way of building bulkheads, didn't you?

A. Yes, and dredging on the opposite side of the slope.

Q. And what sort of bulkheads have been built there?

A. A bulkhead of piling, planking and brush.

Q. What were those bulkheads built for, what is the object?

157 A. For to retain the fill.

Q. And why didn't you build them of stone?

A. The excavation is not within, probably 800 or 1000 feet of the place where the retaining wall is constructed.

Q. Well, there is something back of that place?

A. If the excavation came up to the bulkhead it would require a different character of bulkhead entirely, but it does not come within many hundreds of feet of it.

Q. There is nothing to keep the winds, and the waves driven by the winds, from breaking against it, is there?

A. It is sheltered by being into the land in Smith's Cove about 2600 feet, in the waterway.

Q. I don't understand what you mean.

Q. It is inside of the waterway, where the bulkhead is located, beyond Garfield Street about 3600 feet from the outer end of the piers, and is not exposed.

Q. When the winds and the waves come from the *w*outh and southeasterly, they come square into Smith's Cove, don't they?

A. The- strike against the piers.

Q. During the storms?

A. The- will strike against the piers that are constructed by the Port Commission, and coming from a southwesterly direction they are affected in the same way by the piers of the Great Northern.

Q. As a matter of fact, is it not true that as a wave advances and begins to strike into shallower water, it begins to comb and loses its character as a smooth, flowing wave, and begins to curl and comb as it reaches the shallower water, because of its impinging

158 upon the ground—a wave never combs at sea, but as it approaches the shoaler water?

A. A part of the volume of the water would certainly not have as great force against the pier as the whole.

Q. But it has a different way of striking—a wave comes in in deep water and flows smoothly; as it begins to impinge on the bottom and reaches a certain degree of depth, it then begins, the top of the wave to roll faster than the lower part of the wave; it curls and combs and strikes with a blow, does it not?

A. Breakwaters are usually put in to protect——

Q. Answer my question.

A. The top part is not the part that is destructive to bulkheads.

Q. Why is that?

A. I cannot explain it, but my observation has been that when it is exposed to 28 or 30 feet of water that that is where the destructive force is, rather than where it is exposed to a few feet of water.

Q. You know, as a matter of fact, don't you, that the surface of the water in every moving wave moves faster than the water below it?

A. I do not see how it would get there——

Q. You don't know that?

A. I didn't know that there was a separation in the volume of the water.

Q. You did not know that the top moves faster?

A. After it strikes the dry land it may flow faster and spread, etc., but as the body of the water——

Q. (Interrupting.) Don't you know, as a matter of fact, in
159 the heaviest storms, at a depth of 15 feet you are in calm water?

A. I don't know; I never have been down there and I can't tell you anything about it.

Q. Haven't you read and informed yourself upon that, that a submarine will go down 15 feet and get below a storm on the surface?

A. Submarines are such new things that it is hard to tell what they have to encounter yet.

Q. But you think that the bottom of a wave travels as fast as the top of the waves and strikes as hard a blow as the top of the wave?

A. That I am not experienced in. I could not tell which would be the greater force.

Mr. Thompson. If Your Honor please, in connection with this testimony, if not competent, merely in connection with it, I wish to tender as an exhibit for identification the letter of August 14, 1901, from the Land Commissioner Calvert to Mr. Hays, which is the only one of the originals that counsel on the other side did not introduce, but started to introduce, and was unable to find it in the originals.

Mr. France: I have found the original now, but I have not found the second sheet and I will agree with you, because I would like to have the letter myself.

Mr. Thompson: Then, will you introduce it and it will go in more in sequence.

Mr. France: It is immaterial to me; you can bring the other sheet or make a copy of it and put it in.

Mr. Thompson: Let it be considered then that the letter of August

14, 1901, from Mr. Calvert, Land Commissioner, to W. F.
160 Hays, is introduced as one of your exhibits.

Mr. Thompson:

Q. Now, in those improvements which you made out there, in addition to excavating these waterways, you also said that you built certain bulkheads; what do you know about building a bulkhead across this waterway?

A. There is a retaining wall across the waterway on a line with Garfield Street.

Q. It is at right angles, or practically so, to the waterway?

A. Yes Sir.

Q. And what kind of a bulkhead is that?

A. That is the bulkhead that I just spoke of.

Q. The same character that you just spoke of?

A. Yes.

Q. How long is that bulkhead?

A. The wagerway at that place is 400 feet wide and the bulkhead is of a similar width.

Q. Does that bulkhead continue farther than the mere width of the waterway?

A. I think, probably, it does a little, I am not sure as to the distance.

Q. That bulkhead, as I understand it, cuts off the part of the waterway that is being excavated from the part of the waterway that is being filled up?

A. It cuts off and it has filled up everything north of the bulkhead, that is every part of the waterway as far as the material went to fill up the waterway.

Q. How long is that strip of waterway that is filled up?

A. I should judge, probably, a thousand feet or less; maybe more.

Q. Is it filled up above the surface of the water at high tide?

A. Yes sir.

161 Q. Do you know about what the tide rises and falls there at that place?

A. It rises and falls at extreme tides about 17 feet in the harbor; at ordinary tide about ten or twelve feet; about 14 feet at the average high tide—it varies from about twelve to seventeen.

(Mr. France:)

Q. The electors of the Port District voted certain bonds to build improvements at Smith's Cove Waterway, didn't they?

A. $950,000 of bonds.

Q. How much of that has now been expended at and adjacent to the waterway?

A. I should say, approximately, nine hundred thousand. There is some little balance yet—that is including the purchasing of the site.

Q. And that has been expended in purchasing the dock site and building the Smith's Cove shed?

A. Yes sir.

Q. And installing the cranes and equipment?

A. Other equipment and facilities in the different ways.

Q. I will ask you whether or not, if Mr. Hays were to go ahead with his alleged contract, that would not interfere and destroy the value of those properties which have been built there by the Port Commission?

A. Well, the connecting fill of that with the railroad yards and other fills that we have built there would be completely destroyed and we would be cut off from rail communication as we now have it constructed—we have constructed railroads in connection with the other facilities with the properties.

Q. Explain to the court how that would be, that your connections with your docks and improvements would be isolated if he
162 went ahead with his improvement?

A. If the waterway was to be excavated north of Garfield Street it would cut off the possibility of rail connection with the Port's properties as they are now connected up and in use.

(Mr. Thompson:)

Q. But if Mr. Hays should proceed to carry out his contract according to its terms, it would be necessary for him to remove from the waterway all the material and all the filling which you have put in there?

A. Yes.

Q. In order to get down to where he would grade out the waterway at all?

A. Yes; that would have to be moved in addition to the amount originally intended in the waterway.

(Mr. France:)

Q. And he would have to tear down all the bulkheads which you have built along the sides and in front of all of that property and all of that work?

A. It would make the physical conditions impracticable, and destroy the value of the properties that are now being constructed at public expense, known as the Smith's Cove Dock.

The Court: What is the value of the properties on there?

A. The value of the property—we purchased from the Great Northern the properties that we acquired at sixteen cents a square foot.

The Court: I mean in dollars and cents, what is the value of the improvement placed there by the Port Commission?

A. The Port Commission has made a fill in that portion of the waterway north of Garfield Street I could not—Your Honor I could not tell you just what the value of that fill is, but the property there

that we purchased originally was at sixteen cents a square foot in that section of the city.

163 Mr. France: I think what the court wants to get at is—you stated that $950,000 of bonds had been voted?

A. Yes sir.

Q. And that you had expended substantially $900,000 of that?

A. Yes.

Q. Now, . it worth that amount of money or more—your properties there?

A. I consider it worth a great deal more.

The Court: How much of this sum has been expended there?

A. Practically $900,000.

The Court: In this particular place?

A. Yes sir. I think there is about $50,000 yet which will be taken up for equipment, which will be expended yet in equipment and facilities necessary in the operation of the proper-; but there is now an expenditure of practically $900,000 made at this point.

(Mr. France:)

Q. I understand you to say that if Mr. Hays were permitted by the state of Washington at any future time to carry out his contract in toto, that that would be practically a destruction of the expenditures which the Port had made there?

A. It would destroy its usefulness for the purpose for which the moneys were invested.

(Mr. Thompson:)

Q. Do you know Mr. Bridges how many thousand cubic yards there is in that fill which has been made there?

A. I could not tell you.

Q. No idea at all?

A. No, because I do not know what the depth was originally there.

Q. It runs all the way from about 12 or 14 feet to 3 or 4 feet, does it not?

164 A. Well, I do not know that there would be any of it go to a maximum of 12 or 14 feet, because the farther north you go the shallower was the tide land.

Q. You heard the testimony of the engineer who said that it would average five feet or about that?

A. It might; I am not in a position to say what the average would be.

Q. And you do not know what it would cost to move all that back again?

A. No, I do not, because I do not know what the quantity of material is displaced in the waterway.

Q. Mr. Bridges, that improvement there was made after the passage of this law with reference to giving the Port Commission the right to construct the works in Smith's Cove?

A. The improvement was started, I think, prior to the passage of

that law. I think the law was passed during the pendency of the construction.

Q. They had not done any of this grading of this waterway at that time, had they?

A. I think there was—the work was progressing by filling between the sheet piling, and the surplus material that was in addition to the amount for to make the fill under the wharf itself, was placed in the waterway north of Garfield Street.

Q. Do you know under what authority, if any, they were attempting to proceed, if it was before the passage of that Act?

A. I say that the work started prior to the time of that law being passed, consisted in the filling of the pier itself, and the surplus material was put into the waterway north of Garfield Street after the filling of the pier had been made.

Q. We do not understand — you mean by "pier."

165 A. The pier is 300 feet wide.

Q. What pier is that?

A. The Smith's Cove Pier, constructed by the Port of Seattle, a distance of about 2600 feet, and 300 feet wide.

Q. You mean that large building or warehouse or whatever you call it?

A. The fill that the large building or warehouse sits on.

Q. That has nothing to do whatever with the dredging of this canal, has it?

A. Part of the material came out of a part of that waterway and a part of it out of the slip between there and the Smith's Cove pier.

(Witness excused.)

(Whereupon further proceedings are adjourned until tomorrow, Saturday, April 24, 1915, at ten o'clock a. m.)

166 Seattle, Wash.,
April 24, 1915,—Ten o'clock a. m.

Continuation of proceedings pursuant to adjournment.
All parties present as at former hearing.

W. T. FORREST, produced as a witness on behalf of Defendants, being first duly sworn, testified as follows:

(Mr. France:)

Q. You were Commissioner of Public Lands in the year 1896 when the contract was entered into between Mr. Hays and the state regarding the Smith's Cove Waterway, were you Mr. Forrest?

A. Yes.

Q. You heard the testimony of Mr. Hays, that on or about the 4th or 5th day of May, 1896, he received a telegram from you to start work on the Smith's Cove Waterway. I will ask you what your recollection is regarding the sending of such a telegram?

A. Well, there would be no such telegram as that, unless there was

another order in connection with it. What I mean, that the rec would not be based upon a telegram, unless there was better evide than simply a telegram sent to him.

Q. Well, do you recall sending any such telegram to him?
A. No sir.
Q. You say no?
A. I do not think I did.
Q. You do not think you did?
A. No sir.

Mr. France: That is all.

Cross-examination.

(Mr. Thompson:)

167 Q. Mr. Forrest, you did stop him from that work up the didn't you, and ordered him to stop or suspend the wo until there were different characters of bulkhead secured?
A. I think there was something of that kind, yes.

Mr. Thompson: That is all.

(Witness excused.)

168 J. J. CRYDERMAN, recalled in behalf of defendants, tes fied as follows:

(Mr. France:)

Q. Mr. Cryderman wishes to make a further statement regardi his testimony yesterday.

You were asked by counsel on cross examination regarding t Eads jetty and bulkhead on the Mississippi River.

A. I was; and at that time it rather took me by surprise and was not able to remember just exactly the circumstances. The Ea jetty business was quite dissimilar from this down here, in that, i stead of being pile and brush it was brush mattresses—large bod of brush strapped and floated to the position where they desired place them and then weighted down by rocks. There is no ear behind it. It never was the purpose to retain any earth, but form a sort of cushion so that the current would scour out the cha nel. There was no attempt to retain any material back of the brush mattresses. So that the situation is quite different from an thing which would happen here in this harbor. They were n made as a retaining wall.

Q. You also testified, as I recall it, regarding the custom in t office of the Land Commissioner when you were engineer, as to w was required to make the plans and specifications in reference to t bulkheads under this statute, or other plans and specifications—y wanted to make a further statement in regard to that?

A. Yes. There were no plans made for any purpose in t office of the Commissioner of Public Lands. All plans were fu

nished by outside parties and passed on by the engineer. If it was a case of insufficiency of plans, a notation would be made on the plans or maps ,or a letter would be sent to the parties ex-
169 plaining the further requirements, and the maps would be returned, or the plans; and all changes were made by the parties and signed by the Land Commissioner's office or the engineers of the Land Commissioner's office. In the case of the bulkheads in the southern part of the city here,—I forget the name of the company that was doing the work—there were some changes suggested by the engineer in charge for the state, Mr. Chase. He consulted with me about the matter and I approved the changes—The changes were made by the engineer of the Dredging Company and were sent over to the office and were approved; but no maps or plans were ever made in the office for anybody—that is any outside parties—those were always furnished by the parties themselves and approved or rejected by the engineer in the office.

Cross-examination.

(Mr. Thompson:)

Q. Reverting to your testimony with reference to the Mississippi River jetties that engineer Eads made; those jetties were made in the Mississippi River proper in order to narrow the channel and compel all the water of the Mississippi to run through the narrow channel?

A. Yes.

Q. And therefore to make it deeper at that point and have it scour out at that point?

A. That was the idea, not to retain any earth.

Q. Those jetties were made of brush mattresses simply entangled brush floated down in a mass, weighted with rocks so as to sink them to the bottom of the river and then another mass would be laid upon them or sunk upon that until they came up above the top of the water so as to confine the water?

170 A. Well, I do not remember that they always came above the water. Silt would soon form a bar. It was for the purpose of forming bars on one side.

Q. Now the result was, was it not, that the Mississippi River, bringing its vast quantities of silt finally filled up and entirely covered these jetties and made great sand bars over the tops of the jetties?

A. That was the result.

Q. The winds that traveled across the Gulf all the way from South America for twelve hundred miles did not wash them out, did they?

A. No, it did not wash them out.

Q. And did not even carry the silt out, did it?

A. Well, there was no material back of it to be carried out. It was simply a deep channel, but no earth back of that to be retained.

Q. Now, they effected their purpose, and did change the w
A. Yes, most effectively.
Q. So that the water did not pass through those mattresses a
A. They kept the channel where it was desired to be kept.
Q. Now, referring to the way in which you managed things there in that office, the fact is that when a plan or a specificatio a bulkhead was to be changed, it was to be changed because were dissatisfied with it, was it not?
A. Yes.
Q. Your office was dissatisfied with it?
A. Yes.
Q. And you thought a different plan of bulkhead was better
A. Yes sir.
Q. And you yourself determined what the different plan didn't you?

171 A. We suggested, yes.

Q. Well, you did; you had to finally determine wh you would accept it or not?
A. Yes.
Q. You determined a different plan of bulkhead?
A. Yes.
Q. Did you furnish to the contractor then what you had mined upon?
A. No.
Q. Well how would he know what you had determined up
A. He would simply keep on bringing in plans and we a dealt with the engineer.
Q. Now you swear to His Honor that was the way that was determined—for him to keep on sending in plans until he out just what you wanted—you say you did not furnish him you wanted or demanded.
A. In this case that I mentioned, their engineer came ove talked the matter over and consulted and we decided on changes were desired.
Q. That was what occurred in that case?
A. That was what occurred in that case.
Q. But what was your system—what was the contractor pend upon when you changed the form of bulkhead?
A. Well, we would outline it—that was the only case of eve change in bulkheads.

(Witness excused.)

172 ELMER E. ADAMS, produced as a witness on behalf fendants, being first duly sworn, testified as follows:

(Mr. France:)

Q. State your full name?
A. Elmer E. Adams.
Q. What is your profession or business?

A. Civil engineer.
Q. And how long have you been engaged in that work?
A. Fifteen years.
Q. What is your present position?
A. Engineer with the Great Northern Railway Company.
Q. At my request you prepared roughly certain data regarding the character and nature of the improvements built by the Great Northern Railway Company adjacent to the Smith's Cove Waterway and generally in this territory that is to be filled up under Mr. Hays' contract?
A. I did.
Q. Now state in round figures about what the value of those improvements is?

Mr. Thompson: We object. The Great Northern is not a party to this proceeding at all.
The Court: It may go into the record.
The Witness: As I recollect the figures, it is somewhat over a million dollars in round numbers.

Q. Now going into it a little more in detail, the Great Northern Railway has dredged out a waterway or slip of its own, has it not?
A. It has.
Q. Right adjoining the Smith's Cove Waterway?
A. Yes.

173 Mr. Thompson: In order to preserve the record, I object to any testimony with reference to what the Great Northern Railway Company did.
The Court: I will let it go in under the objection and will give you an exception.

(Mr. France:)

Q. You say they did?
A. They have, yes sir.
Q. That waterway or slip is used by the Great Northern Railway Company in landing the steamship "Minnesota" and various other or trans Pacific line steamers and vessels?
A. It is.
Q. And if Mr. Hays' contract were ever carried out and he were allowed to fill in these lands, it would require the filling of that waterway and slip which the Great Northern Railway Company has built and is now using for its terminal facility?
A. Well, I am not entirely familiar with what Mr. Hays intended to fill, but — he filled to certain elevations it would interfere.
Q. Well, assuming that Mr. Hays' contract provides for the filling in of the tide lands that are just adjacent to the Smith's Cove Waterway, then it would require the filling in of this improvement?
A. It would, yes sir.
Q. And that would destroy the terminal facilities of the Great Northern Railway Company which it has built up there, would it not?

A. I should think it would, yes sir.

Q. Now, in connection with that slip, what has the Great Northern constructed in the way of docks and warehouses and elevators and railroad tracks and terminals?

A. Well, due to the topography of the country in this vicinity, the Great Northern Railway Company has adopted this territory for its main line entrance into the city of Seattle and adjacent to the Smith's Cove Waterway and tide lands they have constructed terminal yards and terminal improvements which are necessary in the operation of railway trains and traffic.

174

Q. And how many miles of tracks and railroads are there right in that vicinity, approximately speaking?

A. Well, I should say in the yards proper there are five or six miles of side tracks and the main line from the dock out to Interbay is probably two or three miles of double track.

Q. What do you know of the experience of the Great Northern Railway Company in building bulkheads under similar conditions as they exist at Smith's Cove Waterway, for the protection of slips and waterways?

A. Well, in this immediate vicinity, my experience has been that a brush and plank bulkhead is not sufficiently strong enough to withstand the stormy action from the southwest, and we attempted this type of construction very recently with our Salmon Bay line of improvements and the storms destroyed it and it necessitated bringing in huge rocks and forming a riprap, and we had to riprap the the entire bulkhead from Smith's Cove down to the Union Oil Company plant at Broad Street.

Q. When you say that they tried or attempted this type of construction, you mean the pile and brush?

A. The pile, brush and plank, yes sir.

Cross-examination.

(Mr. Thompson:)

Q. What you were building there was simply an embankment to carry your railroad?

A. We attempted—we filled, yes sir, filling the tide flats.

Q. You ran over a trestle for a great many years and then finally you filled up that trestle in that way?

175

A. Yes sir.

Q. So that it only made a narrow embankment, the width used by the railroad tracks?

A. Along the shore of the Sound, yes sir.

Q. It was not a filling up of a wide region of ground at all, but a narrow roadway for a railroad?

A. As I recollect it, it consisted of a filling of about sixteen acres of ground.

Q. But that was all in a narrow long embankment for a railroad track?

A. Yes sir.

Q. And that was presented with its side instead of the end of the narrow embankment—with its side to the sweep of the wind?

A. And also some of it not entirely on the side.
Q. What is that?
Q. Some of it not entirely on the side—some of it parallel to the Smith's Cove Waterway.
Q. What you did to it was to tumble loose rock upon it?
A. We placed riprap there.
Q. Now you say that the doing of this work of Mr. Hays in filling up these tide flats would destroy these uses to which the Great Northern has put it—as a matter of fact, the Great Northern has filled up the tide flats there and has put iron buildings upon them and warehouses?
A. I made that statement with certain reservations, providing certain elevations they filled up to.
Q. Provided they filled up to some certain elevation?
A. Yes some certain elevation—provided they filled to a certain elevation.
Q. Provided they filled to a certain elevation?
176 A. Yes sir.
Q. Well what elevation is that?
A. Well, if they filled above the elevation of six city datum—five or six city datum.
Q. What do you mean by that?
A. That is approximately five feet above high tide.
Q. And if they didn't fill five feet above high tide it would not affect you?
A. It would if they filled on the tide flats where our slip is.
Q. That slip is on the northerly side of your fill, is it not?
A. No sir, it is on the southerly side.
Q. Have you more than one slip?
A. That is all—one slip serves both docks.
Q. Do not the Japanese ships come in on the northwesterly side of your big warehouse up there?
A. No, they come in between them.
Q. They come in between the two?
A. They come in between the two.
Q. That is on the northwesterly side of one of them and on the southeasterly side of the other?
A. No sir, they come in on the west side of one and the east side of the other. The docks are north and south.
Q. Are those docks faced north and south or east and west or northwesterly and southeasterly?
A. They are faced north and south.
Q. They are faced north and south?
A. Yes sir.
Q. Do you know what is being complained of in this case—what lands Mr. Hays in this suit is complaining about their being invaded?
A. I think it is the Smith's Cove Waterway.
177 Q. Now, as a matter of fact, the Great Northern, until this last movement of the Port Commission came about, the Great Northern had nothing to do with the Smith's Cove Waterway, did it,—in other words, it was not using the Smith's Cove Waterway—

it was not attempting to grade out the Smith's Cove Waterway, or to fill up any portion of it, was it?

A. I don't know.

Q. You do not know of its having done anything of that kind?

A. I do not know as to what their contemplation was.

Q. But you do know that right lately some kind of a trade has been made with the Great Northern Railway Company and this Port Commission, by which they are to exchange lands—you know about that, don't you?

A. Well, I heard that the exchange was to be made. I had not been advised.

Q. And unless that exchange is made the Great Northern is not affected at all by the Commission's work in clearing out part of this waterway and filling up a portion of it—the Great Northern is not affected by that, is it?

A. Yes, it would be.

Q. How would it be affected?

A. Well, it would fill part of our ground immediately north of the waterway where we have our immense yards.

Q. Well, that is being filled up, isn't it—that part of the waterway—that is the part that the Commission is filling up, isn't it?

A. I don't understand your question, sir.

Q. You know, don't you, that that waterway is crossed now by a bulkhead which the Commission is having built?

A. Yes, I have seen that.

Q. Now, in the direction of that bulkhead towards Smith's
178 Cove the waterway is being filled up, isn't it?

A. I believe it is.

Q. So that that would not affect the Great Northern's land in any way?

A. Well it would, as I said before, if it was filled up to a certain elevation.

Q. If the Port Commission fills it up above a certain elevation it will affect the Great Northern's land?

A. Yes.

Q. In other words it would affect it just the same as Hays would affect it if he filled it up?

A. I don't know—I don't know what Hays intended to fill up.

Q. Does it make any difference who filled it up?

A. Unless it is restricted to a certain elevation.

Q. Whoever fills it to any elevation—one man's filling will affect it just as adversely as another?

A. I don't know.

(Witness excused.)

179 J. R. WEST, produced as a witness on behalf of Defendants, being first duly sworn, testified as follows:

(Mr. France:)

Q. State your full name?

A. J. R. West.

Q. You are a civil engineer by profession Mr. West?
A. I am.
Q. How many years' experience have you had in that work?
A. About ten years.
Q. You are now the chief engineer for the Port of Seattle, the defendant in this case, are you not?
A. I am.
Q. You are familiar with the work that has been done and is being done by the Port Commission at what is known as Smith's Cove Waterway?
A. I am.
Q. I wish you would state what land, approximately the amount of land which the Port of Seattle acquired adjacent to the Smith's Cove Waterway for dock construction and piers?
A. The Port acquired a strip of land lying immediately to the east of the Smith's Cove Waterway, something like a little less than 300 feet in width and lying south of West Garfield Street.
Q. And about how long was it?
A. It is just a few feet less than half a mile in length.
Q. Now you have read the description of the lands in the contract with Mr. Hays and Mr. Shea with the state of Washington, which were to be filled up by dredging the Smith's Cove Waterway.
A. I have.
Q. Is this tract of which you speak a portion of the lands
180 which are included within that tract covered by Mr. Hays' contract?
A. It is.
Q. What has the Port or Commission done in regard to filling up that strip or making improvements on it, Mr. West?
A. The Port Commission has constructed a pier or wharf lying to the east of the Smith's Cove Waterway and extending south from West Garfield Street; the central portion of this wharf is filled ground; the fill being retained between bulkheads, and then the wharf is extended out for a slip on the two sides of the filled area; the outer edge of the wharf on the west side practically coincides with the east line of the Smith Cove Waterway.
Q. Where did you get the earth with which you filled that strip of land?
A. Part of it from the Smith's Cove Waterway and the remainder of it from the slip which was dredged along the east side of the wharf.
Q. By the east side, you mean between your dock and that of the Great Northern?
A. Yes.
Q. This land upon which the dock and warehouse are built was acquired from the Great Northern Railway Company, was it not?
A. I do not recall.
Q. There were bonds in the sum of $950,000 voted by the electors of the Port District to make this improvement adjacent to the Smith's Cove Waterway, were there not?
A. Approximately, yes sir.

Q. And about $900,000 of that issue has already been spent?

A. Yes, something over $900,000 has been either spent or
181 the contracts are now in the course of construction.

Q. Just state a little more in detail the improvements, consisting of buildings, railroad yards, tracks and dirt and elevators, etc., which have been made at that point?

A. The wharf is constructed 310 feet wide; it is practically a double pier there. There is a roadway and four railroad tracks running down the center of it and then railroad tracks on the outer side. At the southerly end there is a freight shed constructed in the shape of the letter "U," with each arm about 600 feet in length, and then a connection between the two branches of the "U" on the south end of the wharf. Altogether there is about two miles of railroad track on this wharf, a large traveling Kanter crane is now being installed, costing about $40,000 for serving the easterly portion of the open wharf. This is for the purpose of handling lumber and structural materials; commodities that can be stored outside of the shed. For some time there has been operating on the wharf the locomotive crane that has been used on the railroad tracks there, that can travel anywhere on the wharf, on the railrod tracks, and that is also used for handling heavy commodities. We have under contemplation the construction of sheer leg derrick, a 100-ton capacity derrick. This will be for the purpose of handling very heavy loads for which there are no other facilities anywhere around Puget Sound at the present time.

Q. What can you handle with that derrick—a railroad locomotive?

A. We can handle locomotives, ordnance for the United States Army and any heavy loads up to something over 100 tons.

Q. And you say there are no such facilities on Puget Sound?

A. No. There is one derrick here in Seattle which has a
182 considerably smaller capacity, but it is not so well located with relation to the shipping facilities as this will be. The wharf is completely equipped with a fire protection system, and automatic sprink-ing system being installed in the sheds, outside of the monitors in the open wharf. The Port Commission laid a 12-inch cast iron water main from Elliott Avenue over to the wharf for the specific purpose of taking care of fire protection.

Q. You have had occasion to investigate the nature and character of bulkheads to be constructed to protect this property, situated such as this is at Smith's Cove?

A. I have.

Q. What is your opinion as to the character of permanent bulkhead which would be required to protect a waterway such as the Smith's Cove Waterway, if it were dredged out?

A. A reasonably permanent type of bulkhead is necessary at that particular point, and the bulkhead which has been constructed appears to be very successful. This bulkhead consists of heavy timber sheet piling driven down into the original ground and anchored back to another bulkhead with steel rods and then a heavy layer of riprap, a large proportion of which is very large stone, laid on the slopes immediately in front of the bulkhead and extending down to the bot-

om of the channel. I do not believe that any lighter type of bulk-
ead than that would have been successful at that point.

Q. What in your opinion would have been the success of a bulk-
ead built of brush and piling at that point?

A. I do not think we could have held it during the storms of the
ast winter. Now that observation I think, or that remark, is based
n the observation of what has actually happened out there at Smith's
Cove. The channel along the west side of the wharf is
83 dredged for a distance of about 1800 feet in from the pier-
head line, and where the channel is dredged we have con-
tructed that sheet piling and rock bulkhead, as I have described.
But where the channel was not dredged, that is for a distance of
bout 700 feet at the north end of the wharf, we used a brush and
umber bulkhead anchored down with piling, and during the last
inter whenever there has been a storm lasting over a day or two
e have had difficulty with that bulkhead. The sand keeps washing
ut behind it and we have difficulty holding it; and that is in spite
f the fact that there has been no dredging immediately in front of
his bulkhead.

Mr. France: That is all at this time, but Mr. West expects some
lata to be here and I will recall him for that.

Cross-examination.

(Mr. Thompson:)

Q. The Great Northern is using out there now on Smith's Cove
timber and brush bulkhead merely weighted with loose fragments of
rock thrown in on it, is it not?

A. I don't know.

Q. You do not know that to be a fact?

A. I know they have rock riprap out there on their slope.

Q. Now when you talk about their having rock riprap of that
kind, you do not — masonry construction?

A. No, it is deposited with a derrick.

Q. That riprap is not what is called a stone wall, is it?

A. Well, a stone wall does not mean anything definite any more
than a wooden house.

Q. It means a wall made of stone?

A. Some kind of a wall made of stone.

184 Q. That riprap is not a wall at all, is it?

A. It is not a vertical wall—it lies on a slope.

Q. It is not what you engineers call a stone wall, *it* it—in other
words, if you were prescribing a stone wall as a bulkhead you would
not mean *brush* with riprap on it, would you—you would not put
that in plans and specifications that the contractors was to construct
a stone wall?

A. Well, merely calling for a stone wall does not mean much—
we would have to specify what kind of a stone wall was intended.

Q. Let me ask you if you were making temporary plans and speci-
fications to furnish a contractor as to what kind of work you expected

him to do, you would not call a riprap, brush weighted with ripra a stone wall, would you?

A. No. I don't think I would.

Q. And as a matter of fact,, you do not mean that a stone wall a masonry wall is required out there in Smith's Cove at all at a place?

Mr. France: I would suggest that I don't think there has been a testimony regarding a stone wall or a masonry wall in this case up the present time.

Mr. Thompson: Well, you say in your letter, which bears on th and which has been introduced in evidence, that it shall be co structed of stones.

(Question repeated to the witness.)

A. I think I testified that the bulkhead and slope protection th we have put in there appears to be adequate.

Q. Now, you gave at some length the character of permanent co struction that you have made there by way of a large dock and wa house connected with it I presume, is it not?

A. There is a freight shed.

Q. And slips on either side of it?

185 A. Both sides.

Q. And does that extend back to the shore proper— the land?

A. It does not extend back to the high tide line there, no.

Q. But it does have connection with the land, does it not?

A. You refer to the wharf?

Q. Yes.

A. The wharf lies at practically the same level as the filled ti lands to the north of there.

Q. The filled tide lands, in other words connects with it, and th filled tide lands have become in effect at least, the shore?

A. Yes.

Q. In filling up the tide lands out there, how would the filli up of that affect this dock and this warehouse, the filling up of t yet-remaining tide lands?

A. Well, it would effect it in a number of ways. If the filli covered the area that is included in that Hays contract it would up the slip along the east side of our wharf. If the waterway w dredged north of Garfield Street it would eliminate the land that necessary for railroad tracks and for access to the wharf; and if t temporary type of bulkhead was used along the east line of Smit Cove Waterway it would practically destroy the usefulness of at le half the wharf.

Q. When this wharf was built and this slip was built, you kn of the existence of the Hays contract, didn't you?

A. I did not, personally.

Mr. France: I object to that as irrelevant, immaterial and i competent.

186 The Court: The objection is sustained.

(Mr. Thompson:)

Q. You knew of that, did you?

The Court: I have sustained the objection.

Redirect examination.

(Mr. France:)

Q. I just want to ask a few questions. About what time was it that you first began dredging on the Smith's Cove Waterway and filling in the lands which the Port has purchased to the east thereof?

A. As I recall it it was in September, 1913—the dredging was commenced during September, 1913.

Q. And when did the building commence?

A. The actual work on the construction of the bulkhead and wharf commenced in June, 1913.

Q. So that you were at work at that point as early as June 13th?

A. We were.

Q. Now what was the bulkhead that you were building there in June, 1913?

A. That was a portion of the main *sheep* piling bulkhead for the wharf. It was more economical to drive the piling before the dredging and filling operations were well under way, and the work was started in driving the piling.

Q. You have examined the description of the lands which were to be filled in the Hays contract?

A. I have.

Q. You know from that examination about the area and extent thereof?

A. I do.

Q. I will ask you whether or not the Great Northern slip docks and improvements and railroad running up to it, are included

187 within that area?

A. They are.

(Mr. Thompson:)

Q. Mr. West, in these improvements which you speak of that is being done, how much of the waterway has been filled up by you people?

A. I don't know exactly.

Q. As nearly as you can tell?

A. The filling was made north of Garfield Street. I could not say, I could not give an estimate.

Q. Can you give an estimate of the length of it?

A. I do not know; I never walked up over it and I never examined the plans.

Q. Would you know within a few hundred feet?

A. I would not want to venture a guess.

Q. How wide is that strip that is filled?
A. At the southerly end it is the width of the waterway.
Q. And that is how much?
A. 400 feet.
Q. And then how far does that 400 feet extend, approximately
A. I would not care to venture a guess on that. It would
merely a guess.
Q. Then does it gradually narrow and narrow as an offset a
approaches the shore?
A. As I recall it, the filling was carried up to a certain dista
north of Garfield Street at a uniform elevation and then north
that it was simply allowed to take its natural slope and narrow
and slope down to about the original ground.
Q. And what is the depth of that filling?
A. Well, it *various*, because the surface of the origi
188 ground is not a uniform level—the surface of the fill is ab
five feet above city datum.

(Witness excused.)

189 MAUD S. TAMBLIN, recalled on behalf of Defendants, te
fied as follows:

(Mr. France:)

Q. Mrs. Tamblin, this morning at my request you have go
through all of the files and letters relating to the Hays contr
which you brought with you from Olympia?
A. Yes.
Q. Now you stated yesterday I believe, that those files which y
brought over with you were all the files relating to that matt
A. They were all that I could find in the records.
Q. I will ask you whether or not you found a carbon copy o
telegram dated at any time in the month of May, 1896, from W.
Forrest to Mr. Hays?
A. I did not.
Q. You did not find any such?
A. No sir.
Q. Now referring, Mrs. Tamblin, to defendants' exhibit "
marked for identification—those are some of the original papers
file in the Hays matter?
A. Yes.
Q. Among those papers is the bond which was acknowledged
the 7th day of March, 1896; is that the original bond which M
Hays and Mr. Shea gave?
A. Yes.
Q. Attached to that, this same exhibit "L" for identification, p
ports to be an assignment from Frank Shea; that is on file?
A. That is on file.
Q. Now, referring to defendants' exhibit "M", is that t
190 original agreement between Mr. Hays and Mr. Shea a
the state on file?

A. Yes, that is for the excavation of the Smith's Cove Waterway.

Mr. France: That is all.

Cross-examination:

(Mr. Thompson:)

Q. In looking for the telegram you spoke of you say you looked for all the papers and correspondence backwards and forwards with reference to this contract with Mr. Hays.

A. Yes.

Q. Did you look for anything else under the name of Hays—did you look for the correspondence with the Dredging Company?

A. Yes, I am familiar with the Dredging Company and all those conditions—I am familiar with all those papers, so that I watched for all letters or anything having to do with the Dredging Company.

Q. And that was in the office of the Commissioner of Public Lands?

A. Yes sir.

Q. Did you find this letter (showing)?

A. I do *now* know that I could tell from memory. I could tell letter from our own files. This is a copy of it?

Q. You don't know whether you found that or not?

A. There are a great many letters and files and I could not recognize each one of them.

Q. There are a great many of them that have not been brought here?

A. I think everything is here.

Q. You think by looking at your files you could tell
191 whether this is among them?

Mr. France: I understand that this is the letter of August 14th, 1901, which we were to supply yesterday, defendants' exhibit "N"—this is the letter from Calvert to Mr. Hays.

(Document received in evidence without objection and marked "Defendants' exhibit N.")

Mr. France: Now I want to offer a certified copy of the transcript on appeal in the case of William F. Hays against James J. Hill, which is the case reported in the 23rd Washington, certified by the Supreme Court.

Mr. Thompson: I object on the ground that it serves no purpose and encumbers the record, as we have called attention and made a part of our case, this case which is reported in the record in the 23rd Washington.

Mr. France: I desire to show, if Your Honor please, that the same questions were presented and contested in that case as in this case.

The Court: Since the case has been referred to and called attention to by the plaintiff, I think that the transcript, perhaps, should be received in connection with it.

Mr. Thompson: The only objection I have to it is that is simpl encumbering and burdening the record.

(Document received in evidence and marked "Defendants' exhib O.")

Mr. France: I also desire, if Your Honor please, to offer i evidence a copy of the appellant's brief and the respondent's brie in the same case, to be attached and made a part of that exhibit "O'

The Court: They can go in under the same objection an exception.

192 Mr. Thompson: I don't think they are competent.

The Court: Very likely not, I may exclude them entirely whe I come to consider the matter.

Mr. France: I want to call the attention of counsel to the fac that you offered something which you said was the original, tha is something which was attached—there are original files attache together and I could not separate them and I offered the bond an the assignment which are attached to the other papers.

Mr. Thompson: Is that the original bond or a copy?

Mr. France: The original bond, and so identified by Mr. Tamblin

Mr. Thompson: I suppose that is correct—that is the original

The Witness (Maud S. Tamblin): That letter is not in there and I would like to say that in searching the correspondence I was looking for letters in which the name of Hays or the Washing ton Dredging Company or Frank Shea would be found at the to of the letter, and that letter is addressed to somebody else.

Mr. France: And by reason of it being addressed to somebod else you would not expect it?

A. No, I was not looking for that.

Mr. France: This is a letter addressed by Mr. Calvert to R. B Woodenberg, Secretary of the Construction Company.

The Witness: No, I would not have seen that.

Mr. France: And Mr. Hays would not have received a lette addressed to Mr. Woodenberg, would he?

Mr. Thompson: No.

(Witness excused.)

193 J. R. WEST, recalled on behalf of Defendants, testified a follows:

(Mr. France:)

Q. At my request you made a computation of the amount o yardage which would be required to fill the lands which are covere by Mr. Hays' contract?

A. Yes, it was made under my direction.

Q. You took the lands which were described in the contract and made a check of the number of yardage that was required?

A. We did.

Q. How much yardage would it require to fill in these lands?
A. Approximately, seven million cubic yards to fill the land up to two feet above city datum.
Q. And you also made a computation of the amount of earth that could be gotten from the Smith's Cove Waterway to fill these lands?
A. I did.
Q. How many yards, and how much did you find it to be?
A. Approximately, two million cubic yards.
Q. In other words, the earth that would be taken from the waterway itself would fill in less than one-third of these lands?
A. That is correct.
Q. And if the lands were filled in, earth from other sources would have to be obtained?
A. It would.
Q. I think you wanted to make some statement regarding an experience you had at another point on the Sound regarding the character of bulkhead?
A. It was in this same improvement, at the southwesterly corner of the area that is enclosed by the bulkhead, we had very
194 serious difficulty in maintaining the fill back of the bulkhead. It was necessary before we got through there to use riprap, a good many pieces as large as the top of an ordinary library table, and fill it up to a depth of probably 15 feet, before we could hold the fill back of the bulkhead. That was due to the depth of water there and the character of the material which is obtained from dredging the waterway, and the exposure to the wave action. Now this portion of the bulkhead was in slightly shallower water than any bulkhead built along the pierhead line would be, so that the conditions would be even worse along the pierhead line than they were at these places.

Cross-examination.

(Mr. Thompson:)

Q. Why would conditions be worse along the pierhead line than in the shallower water?
A. Because you have a greater depth of water to contend with, that is you have a greater height to fill back of your bulkhead to contend with, and your tidal currents are stronger, and the tidal currents are of considerable importance at the Smith's Cove Waterway.
Q. In speaking of the wave action, the wave that runs in is not the moving inward of the whole body of water; it is the moving inward of the surface of the water?
A. The water at the surface and for a certain depth down, depending on the nature of the wave.
Q. As a matter of fact, if the water is 40 feet deep the bottom of it is not moving at all, is it, inward, but rather is moving outward, because it is displaced by the water that is moving in from the
195 top?

A. I don't know.

Q. Don't you know, as a matter of fact, that the wind action upon the surface of the water operates only to the depth of a very few inches and moves the water inward, and as a matter of fact the balance of the water is, to a slight degree moving outward, because it is displaced at the shore by this water that moves in from the top?

A. That may be true, I don't know.

Q. You never experimented with that?

A. I never did.

Q. In your computations as to the amount of the cubic yardage in the waterway, did you compute the whole of the waterway?

A. We did. We computed it on the one-half-to-one slope, which is a steeper slope than they could maintain without the rock riprap, so that it gave a larger quantity of excavation than could actually be done unless the slopes were riprap-ed.

Q. And you figured the full length?

A. The full length.

(Witness excused.)

196 ROBERT BRIDGES, recalled on behalf of defendants, testified as follows:

(Mr. France:)

Q. Mr. Bridges, you were acquainted with Mr. J. M. Frink of this city during his lifetime, were you not?

A. Yes sir.

Q. Mr. Frink is now dead?

A. Yes sir.

Q. He is the same Frink who is one of the bondsmen upon Mr. Hays' bond in this contract?

A. Yes, the late J. M. Frink.

Q. Now Mr. Bridges, the Port Commission has acquired and now owns title to the vacated Smith's Cove Waterway, by reason of having obtained the consent of all the abutting owners thereof?

A. Yes.

Q. As provided in the Act of 1913?

A. Yes.

Cross-examination.

(Mr. Thompson:)

Q. Mr. Bridges when did Mr. Frink die?

A. Sometime about the beginning of the year I think, I do not remember the date, something about New Year's or somewhere along there.

Q. And Mr. Frink's estate was entirely solvent, was it not?

A. I believe it was.

Q. He died as a rich man.

A. I believe that is correct.

Q. Never any question at all about his ability as a bondsman?
A. None whatever.

197 Mr. Thompson: There are two or three questions that I intended to recall Mr. Bridges for on cross examination.

Q. You spoke on yesterday something about "Many of Mr. Hays' promises to you" had turned out worthless or something of that kind—what promises did he ever make to you that turned out to be incorrect and were not kept?
A. A short time ago, in dealing with this particular matter, he came to my office and talked with me as a member of the Port Commission and said if he could secure from the Port Commission——
Q. Could what?
A. (Continuing:) Could secure through the Port Commission a sum as a deposit, that it would be in the interest of public policy that the Port Commission obtain the contract, and if he could secure a consideration that he would pay to me, Robert Bridges, as a member of the Port Commission for securing the same, fifty per cent of the amount so secured. When the Port Commission met at its next session I reported to my associates the conversation which had taken place between myself and Mr. Hays, and Mr. Harold Preston, attorney for the Port Commission said "I had a similar offer—if we had accepted it we would have had the whole thing in our own possession now."
Q. Is that one of the promises?
A. That is one of the things—I said that he was long on promises of all kinds, and I said also and I desire to state now that during my term as Commissioner of Public Lands, that Mr. Hays repeatedly came to the office and tried to make overtures of inducements of one kind and another in order to get me as Commissioner
198 of Public Lands, to do things which would be suitable for him in relation to his contract.
Q. And that is some of the promises that he broke to you?
A. I am not saying——
Q. (Interrupting.) Didn't you state on yesterday that he had failed in so many of his promises?
A. If I did, I intended to put it that he was long on promises; I think that was the language I used—at least that was what I had in mind.
Q. And you undertook in that way, by inference, to say to the court that he had been trying to bribe you, something of that kind?
A. I do not know what inference the court would take, but I am simply repeating the facts which have taken place, and the fact that he has made a number of statements of that kind to me as a public official.
Q. That if the Commission would take over this property——
A. Yes.
Q. —take over his contract?
A. Yes.

Q. In other words, he wanted to sell his contract to the Com
mission?

A. Yes sir.

Q. Mr. Bridges, you say that the public papers of Mr. Calvert i
connection with this waterway came into the hands of the Com
mission—did you ever see that (showing)?

A. I never saw it until I saw it over there at the desk a few mi
utes ago. I did not know that it was in existence.

Q. You knew that Mr. Calvert was Commissioner in Augu
1902?

A. Yes.

Q. That was long after you ceased to be Commissioner
Public Lands?

199 A. That was the year following.

Q. The year following?

A. The year following the expiration of my term as Commi
sioner of Public Lands.

Q. When did your term expire?

A. January, 1901.

Q. And this was August 18th, 1902, a year and a half after

A. Yes.

Mr. Thompson: I will ask to have this identified.

Mr. France: This is a letter from Mr. Calvert to one Balendors; i
is objectionable, but it can go in with the understanding that I am
objecting to all this.

(Document marked "Plaintiff's exhibit No. 31.")

(Mr. Thompson:)

Q. Mr. Bridges, you made the statement practically on yesterday
as I recollect it, that if Hays was permitted to carry out his contract
that the $900,000, or practically that, that had been expended by
the Port Commission in this Smith's Cove Waterway work would
be lost?

A. It would upset the plans that the entire expenditure and the
work has been constructed in relation to—the general water ter
minal facilities.

Q. In what way would this work be lost; what part of it would
be lost?

A. It would be lost in this, that any physical connections for
railroad purposes which would be suitable for the property as it is
now laid out and constructed——

Q. (Interrupting.) Under this great dock and warehouse has al
ready been filled?

A. Yes.

200 Q. So that that would not have to be filled in under Mr.
Hays' contract?

A. No sir, it would not have to be filled; it is filled now.

Q. It stands already filled?

A. Yes.

Q. So that the only injury would be that it would be less accessible than now?

A. The amount of yards for storage that is required for a lumber dock and general ships' dock of the character for which the public funds have been expended, the lands lying immediately north in the waterway and adjacent to is necessary in order to meet the requirements of a facility of that immense character.

Q. It is simply a question of the facility and ease with which an outlet could be made thereafter?

A. The abruptness on both sides of the hill connected with the valley lying through between Salmon Bay and Smith's Cove, known as Interbay, would make it almost a practical impossibility for to meet the requirements of storage and other railroad terminal facilities, to meet the requirements of the large lumber and general merchandise dock now constructed at public expense if a waterway was cut through the middle of it 400 feet in width.

Q. That improvement that you are making there, that the Commission is making, do you mean by that that it is going to occupy this waterway or a portion of it?

A. It will occupy a portion of the waterway and also for slip purposes and for vessels to lay there, and a considerable portion for yardage for storage for car service to meet the requirements of a facility of that character.

Q. In other words, my question is, that it is going to destroy a great portion of that waterway as a waterway?

201 A. The work of the Commission——

Q. (Interrupting.) Can you answer this question without starting off on something else—as a matter of fact, the work of the Commission that it is doing will destroy, as a waterway, a large portion of that waterway?

A. It will make useful a portion of the waterway, approximately one-half for a slip purpose and the other for yards for storage for cars and terminal service.

Q. I do not want to argue with you Mr. Bridges, but I do ask you to answer my questions. The work of the Commission that you are carrying on out there and engaged in will destroy as a waterway a large portion of this waterway, will it not?

A. It will make it more practicable than if the original plan was carried into execution.

Q. There would not be any waterway at all if you carry it up above high tide?

A. It is more serviceable. Part of it will be put to its fullest use and a part of it will be for——

Q. (Interrupting.) And that part filled will be absolutely abrogated as a waterway?

A. Certainly.

Q. There will be no waterway there?

A. Certainly.

Redirect examination.

(Mr. France:)

Q. Following the last line of examination—or to the east of th pier and warehouse which you have built on the land purchase from the Great Northern, lies a slip?

202 A. Yes sir.

Q. For vessels to come in alongside your dock?

A. Yes sir.

Q. That slip lies between you and the Great Northern dock?

A. Yes.

Q. Now that slip is part of the land which will be filled by M Hays' contract, is it not?

A. Yes.

Q. And if Mr. Hays were permitted to carry out his contract, th slip would be filled up and would leave the east side of your doc and the west side of the Great Northern dock, instead of abutting o water, abutting on dry land?

A. If the contract was carried out with the construction of th Smith's Cove Waterway, it would, approximately, furnish a wate way of 400 feet width between the property lines approximately on mile in length, a slip constructed to the east of the pier by the Po Commission is approximately one-half a mile in length. The dredg ing of the Smith's Cove Waterway by the Port Commission is ap proximately one-half mile in length; so that, as far as the slip fo vessels is concerned, we have preserved a waterway equal to wha the original waterway was, but put it in a position which is mor accessible and can be placed to better use in that particular locatio than if the original waterway was constructed as a whole. There i no lessening of the amount of the water area for ship purposes unde the plans proposed and constructed by the Port Commission.

Q. Except that you have a waterway now on either side of modern dock with modern equipment.

A. We have two, instead of one.

Q. Now, what I wanted to get at specifically is, if Mr. Hay

203 went ahead with his contract and filled in the tide lands jus to the east of your dock, that would become filled-in land in stead of a slip with water under it, would it not?

A. It would make, in other words it would make a one-sided pie instead of a pier with a slip to accommodate vessels on both sides b filling in.

Q. And it would shut you off from access to the water on the eas side of your pier, and the Great Northern off from access to th water on the west side of its pier, would it not?

A. It would render almost ineffective under the plans of the Por Commission, one-half of the value of the property which is now con structed.

Q. At an expense of $950,000?

A. Yes sir.

Q. Now your railroad terminal runs along the east side of the dock, doesn't it Mr. Bridges?

A. We have a line of tracks on both the east and west side of the dock, and four lines of track running through the center of the dock.

Q. Do you have a track on the east side of the dock?

A. Yes.

Q. And this derrick which you propose to build there to handle structures of 100-ton capacity, that has been provided to locate that on the east side of the dock?

A. The sheer leg is placed on the east side, and also the Kinder crane at a cost of approximately $40,000 for the handling of lumber.

Q. And if that portion of the tide lands represented by the slip between your pier and the Great Northern pier were filled up, then you would not have access to these tracks or to the sheer leg
204 derrick, or your derricks on that east side?

A. It would shut us off from water access.

(Mr. Thompson:)

Q. You testified on yesterday Mr. Bridges, in substance, that in 1898 you considered this contract with the Washington Dredging & Improvement Company to have been abandoned?

A. In 1898 I went out to Smith's Cove with the specific purpose, as Commissioner of Public Lands, of ascertaining if there was any evidence of any kind or character whatever that anything had ever been done in relation to the Smith's Cove Waterway contract. I could find no evidence of any kind, and as such Commissioner proceeded to take such steps as might be necessary to cancel the contract.

Q. And you said on yesterday that you considered it abandoned, is that what you say now?

A. It never was started, so that there was nothing to abandon. I could find no evidence of anything started.

Q. As a matter of fact, years after this, late in 1901, you issued your sixth bi-annual report?

A. Yes, 1901.

Q. And in that you go on to say "Other waterway improvements," and you report that on May 21, 1900 R. B. Leaman filed a notice of intention to improve what is known as the City Waterway at Tacoma, and you say R. B. Leaman also on August 15 filed notice of intention to improve the Puyallup Waterway. And then you say "As regards the Washington Dredging Company's contract for the construction of the Smith's Cove Waterway at Seattle, nothing has been reported"—you did not consider that as an abandoned waterway then—you said "other waterway improvements?"

A. I said also in the report preceding that, that upon the
205 advice of the Attorney General the matter was taken under advisement and held under suspension and I then refer the whole subject matter to the Legislature.

Q. In this final report of yours you treated it as a live improvement, without criticism?

A. There was not anything to criticize—it was under suspension.

(Witness excused.)

Mr. France: I want to call Mr. Hays for further cross examination.

W. F. HAYS, recalled for further cross examination, testified as follows:

(Mr. France:)

Q. Did Mr. Shea ever sign this original agreement?

A. I don't think he did. I think that was signed by me for him, as his attorney in fact. I had, I know, a power of attorney from him, and I think that power of attorney was probably filed with the Commissioner at the time, but I am not sure.

Q. You are familiar with Mr. Shea's signature, are you not?

A. Yes.

Q. Now here is an assignment—I refer to defendants' exhibit "M"—here is an assignment made by Mr. Frank Shea to yourself, duly acknowledged in the state of California and in the city and county of San Francisco on the 2nd day of March, 1896.

A. Yes.

Q. That assignment you filed with the State Land Com-
206 missioner, did you not?

A. I presume I did.

Q. And that is Mr. Frank Shea's signature attached thereto?

A. That is his signature.

Q. Now that purports to be an assignment of this contract, does it not?

A. Yes sir.

Q. And it is made on the 2nd day of March, 1896?

A. Yes.

Q. The contract was not executed until the 7th day of March, 1896, was it?

A. I believe not. The first contract was signed and entered into on the 2nd day of August, 1895.

Q. But that was not a contract, was it, until the Governor approved it?

A. Well, that was the first contract and it would not become so without the approval of the Governor.

Q. But the modified contract was made on the 2nd day of March, 1896?

A. Yes.

Q. Or the 7th day of March, 1896, I think the date is?

A. I think that is correct.

Q. And Mr. Shay at that time was in San Francisco, wasn't he?

A. Yes.

Q. He was in San Francisco?

A. Yes.

Q. So when this contract was signed and executed it was signed "William F. Hays and Frank Shea"—you signed Frank Shea's name to it, didn't you?

A. That's right.

207 Q. It does not appear however to be by any power of attorney—it is just "William F. Hays and Frank S-ea."

A. Frank Shea, he ratified it and he gave me his power of attorney and authorized by letter the assignment of his interest in the contract to me.

Q. Now, referring to defendants' exhibit "L," there is another assignment dated July 25, 1895, from Frank Shea to yourself?

A. That was subsequent.

Q. That was not subsequent.

A. That was subsequent to the first contract, or before—well, you see the application for the contract was pending sometime—quite a while—and he assigned all his right, title and interest in and to that certain application made to the state of Washington through its proper officials to Frank Shea and myself for a contract to construct a waterway in and through Smith's Cove at Seattle Harbor. Now this was an assignment not of the contract, but the application.

Q. Is that an assignment of the application?

A. Yes, that was before the application had been awarded.

Q. That was made for a valuable consideration?

A. Yes.

Q. That was made before the contract was awarded?

A. Yes.

Q. But Mr. Shea really had no interest in this contract from that time on, did he?

A. No sir, no real beneficial interest.

Q. Now, referring again to defendants' exhibit "L," the original bond, that was never signed by Mr. Shea, it was signed by you as attorney in fact for Mr. Shea?

A. Yes.

208 Q. And was executed on the 7th day of March, 1896, wasn't it.

A. That is right.

Mr. Thompson: You have also in that package the power of attorney.

Mr. France: I think there is no power of attorney on file at this time—you introduced a power of attorney made in the year 1903.

Redirect examination.

(Mr. Thompson:)

Q. Mr. Hays, I do not care to re-examine you upon any of these particular points, but there was one answer of Mr. Bridges which I want to ask you about. You heard the statement made by Mr. Bridges with reference to your attempt to induce him to present to the Commission and have them take over this contract of yours?

A. I did.

Q. What is the fact about that, Mr. Hays?

A. The facts about that are these: I first went to General Chittenden, who was the President of the Port Commission, and I told him of my owning the contract with the state of Washington for the

reclamation of the lands at Smith's Cove, and I said I was informe
from public records or notices in the press that it was the purpos
of the Port of Seattle to reclaim something like 20 acres of land i
that cove by the filling; that I, by virtue of my contract, was to re
ceive a profit of 15 per cent upon the filling and that filling in woul
have to be borne by the land owners, and that under my contract
thought the Port of Seattle could save a large expense in the matte
of their proposed improvement, that if they would coopera
209 with me in any way, either to take the contract over by a
assignment and holding an interest in the contract as th
absolute owner they could proceed under the contract and enfor
the lien upon the land owners whose lands would necessarily have t
be filled, and that would redound to the benefit of the contracto
that per cent—15 per cent, over and above the actual cost of filling

Mr. France: I desire to object to this line of testimony, on th
ground that the Port of Seattle would not be authorized or empow
ered to carry on such work as this. There would be no authorit
under its incorporation to take over this contract, even if it was de
sired.

Mr. Thompson: It was not a question of taking over this contrac

The Court: You asked him about Mr. Bridges' testimony and h
is relating now a conversation with General Chittenden, so that
think the objection to this conversation must be sustained.

Mr. Thompson: I did not ask this; I asked him to state what th
fact was with reference to that conversation with Mr. Bridges.

The Witness: If the court will pardon me, I am leading up to tha

The Court: You know we can't take this other matter into consi
eration—you were asked about a conversation with Mr. Bridges.

The Witness: Mr. Preston was mentioned by——

The Court: I am not arguing this with you—just answer Mr
Thompson's questions.

The Witness: I then was referred by Mr. Chittenden to Mr
Preston.

Mr. Thompson: Come to Mr. Bridges—Preston has not testi
fied.

210 The Witness: In my conversation with Mr. Bridges—I wa
referred to him through the fact that I had my conversation
with Mr. Preston and Mr. Chittenden in which I had said to them
that I would give them one-half of the profit that we could realiz
from this contract if they would take the contract over; that I be
lieved by cooperation between us we could fill in these lands, all o
them at Smith's Cove, and in doing so save the Port Commission a
least $150,000 in their actual expenditures, besides adding a value o
a million or a million and a half dollars to the land that was around
in Smith's Cove, and for that purpose I was willing to divide th
profit one-half with the Port of Seattle. That was the bribe I offered
Now I wish to answer another question. I have been in his office
in Olympia when he was Commissioner of Public Lands, and I
positively state to this court that at no time in my life did I ever
offer to bribe him or any other man—I don't care who—I will mak

it a broad statement, and it is an insinuation which should be repelled.

Mr. Thompson: That is all Mr. Hays.

(Mr. France:)

Q. Do I understand you to say that you said to Mr. Preston that you would give him half?

A. Yes.

Q. Of all that was made to the Port Commission?

A. Yes sir. I at no time offered Mr. Preston any inducement other than that, and that only as the lawyer representing the Port of Seattle.

Q. What was the time and occasion that you went to see Mr. Preston in reference to this?

A. Pursuant to the first interview I had with Chittenden, who wanted to know the legal status of the contract and referred
211 me to his attorney. I had three different interviews with Mr. Preston over the question of the legal status of the contract and at every one of those interviews he admitted that the contract was in perfect form and valid. He then told me to go back to Mr. Chittenden—it was all right to report back. I went back to Mr. Chittenden and told him what Mr. Preston had told me, and he requested me to return to him—and that was the last I heard from Mr. Chittenden.

Mr. France: That is all.

The Witness: I wish to ask an original question.

Mr. Thompson: Mr. Hays wants to make one suggestion—I don't understand the purport of it but——

The Witness: Mr. Bridges has stated that the Port of Seattle has expended $900,000, or approximately in money or improvements; but if this contract should be performed that would practically be worthless, or would be rendered in a sense at least, greatly impaired. The contract contemplates only the filling of tide lands which are not filled, and the raising of them two feet above the line of extreme high tide. All lands which are filled, of course, are not subject to the contract. The waterway that has been excavated is not subject to the contract, because it is in use. The Supreme Court of the State of Washington, in the case of Hays against Hill, held that where the lands were withdrawn from the operation of this contract either by the excavation of a waterway or the reclamation of them by filling, that the contractor would be entitled to his compensation in the way of the percentage of the profit which was given on that area to the extent of what it would cost really to fill them when the contract was fully performed, but not until then.

212 Mr. France: I move to strike that out from the record, as to what the Supreme Court of the United States or of this state held in any case—that speaks for itself.

The Court: This is really more in the nature of an argument.

Mr. Thompson: I understood that myself, but Mr. Bridges desire to make that statement.

Mr. France: This witness is a lawyer and he wanders off into thes things.

The Court: That is really a matter of argument on the law of th case and it is not testimony.

The Witness (continuing): I merely want to say that there coul be no loss in the performance of this contract excepting the los which the Port of Seattle has incurred by filling in by its encroach ment upon the waterway. The lands that it filled in the wate way——

The Court: That is a matter of argument and not testimony.

Mr. France: I just want to ask Mr. Hays one question in relatio to that.

Q. Now, the land which the Port Commission bought from th Great Northern Railway Company and upon which its Smith's Cov dock is built, is not within the Smith's Cove Waterway, is it?

A. All of it?

Q. Not within the waterway itself?

A. Not within the waterway—but it is within the Smith's Cov contract.

Q. It is within the Smith's Cove contract?

A. Yes.

Q. That pier runs out into the water, with the Smith's Cov
213 Waterway on the west?

A. Yes.

Q. And a slip which has been dredged out on the east, does i not?

A. Yes.

Q. Now, that is what we call a double cased dock, casing on th west on the Smith's Cove Waterway and on the east on the slip o which I spoke?

A. Yes.

Q. Now that slip to the east, lying between the Port Commission dock and the Great Northern dock, is a part of the tide land covere by your contract?

A. Yes.

Q. And if you went ahead it would be filled up?

A. Not at all.

Q. Why not?

A. For the simple reason that it has been appropriated, and hav ing been appropriated without objection on the part of the con tractor, it certainly could not now be set aside.

Q. Do you mean to say then that all of this land that has now bee appropriated for private use would not come under the operation o your contract?

A. It would, to the extent of the percentage only that the con tractor would be entitled to receive at the final consummation of th work.

Q. How could it be determined and who would determine wha

portions had been appropriated and should be filled—who would determine that?

A. The engineer of the state and the engineer of the contractor—they would determine what had to be filled under the contract.

(Witness excused.)

214 P. D. HAMLIN, recalled on behalf of plaintiff, testified as follows:

(Mr. Thompson:)

Q. You testified on yesterday that you were the engineer and that you made the maps of this waterway etc.—what was the acreage in that Smith's Cove contract?

A. 267.

Q. What is the amount of cubic yards to be excavated in this waterway?

A. About two million and a half.

Q. What is the amount of the cubic yards to be filled in the Smith's Cove?

A. The fill on the west side of the waterway was an average of 12 feet and on the east side 13, making altogether 5,500,000 cubic yards.

Q. How much of that has been filled by the Smith's Cove improvement put in there by the Great Northern and Mr. Hill?

A. I am unable to say.

Q. Is it quite a large *about* of it?

A. Quite a large amount.

Q. And it runs probably about how much?

A. I would not make a statement, because I never examined it.

Q. You have no approximate idea?

A. No sir I have not, I would not wish to state.

Q. You have noticed the filling that has been done and is being done in the body of the waterway by the Port Commission?

A. I looked at it casually, yes sir, from the Garfield Street bridge.

215 Q. What structures or improvements of any kind have been put upon that filled portion of the waterway?

A. I do not recall of having seen any.

Q. As a matter of fact, there are none observable?

A. I do not recall of having seen any.

Mr. Hays: I wish to withdraw one of these exhibits—will you just state to the court what this is.

The Witness: This is a blue print of bulkhead plan "A" and "B."

Mr. Hays: And the map that was introduced yesterday was "A" without the "B," and we desire now to withdraw the "A" of yesterday and to substitute the "A" and "B."

Mr. France: I have no objection.

(Witness excused.)

216 HAROLD PRESTON, produced as a witness on behalf of defendants, being first duly sworn, testified as follows:

(Mr. France:)

Q. You are Mr. Harold Preston?

A. Yes.

Q. And you were the attorney for the Port of Seattle up to April 1st of this year?

A. One of them.

Q. And you have been such attorney since the organization of the Port Commission?

A. No; since February, 1912, I think was the date.

Q. Now, there has come in question in this case, Mr. Preston, brought out by counsel on cross examination of Mr. Bridges, some statements alleged to have been made to you by Mr. Hays, the date not being specifically stated, but while you were attorney for the Port Commission, to the effect that Mr. Hays made to you a proposition that he would give you fifty per cent of the interest in his contract if you would arrange to see that the Port Commission took that contract from him in order for the Port Commission to carry it out. Do you recall any such conversation?

A. Yes.

Q. Just state to the court what it was.

A. Mr. Hays had made a proposition to the Port Commission to sell his Smith's Cove contract with the state to the Port Commission for $30,000. The Port Commission referred the matter to me for investigation as to what rights, if any, Mr. Hays had to sell, or what he had to sell, from the legal standpoint. Mr. Hays submitted to me some papers which he claimed showed that he had an
217 existing contract with the state of Washington for the excavation of the Smith's Cove Waterway, and he said to me that—I cannot recall the words—the substance of it was that if I would persuade or induce, or something of that kind, the Port Commission to accept his proposition that he would give me one-half of the $30,000.

Cross-examination.

(Mr. Thompson:)

Q. Mr. Preston, did you understand at that time that that was to be paid to you for yourself, or to be allowed to the Port Commission?

A. Paid to me.

Q. In order to refresh your mind, Mr. Preston, and to reach what I have understood to be the fact, if it is a fact; did not—was not this what occurred: that he came to you and told you that he had presented to General Chittenden this theory; that the Port Commission could have one-half of the 15 per cent profit that he was to be entitled to over and above the cost of making that improvement; if

he Port Commission would take over his contract that that could e done and that he would divide his profit that he would make qually with the Port Commission?

A. No.

Q. And such conversation as that never occurred at all?

A. No.

Q. You never told Mr. Bridges that there was any such conversaion as that—never reported to Mr. Bridges or anybody else about hat kind of a conversation?

A. No. I reported to the Port Commission the conversa-
218 tion which actually occurred.

Q. But no member of the Port Commission, neither Mr. Bridges or anyone else, reported to you the fact that he was trying o divide his percentage with the Port Commission if they would ake over his contract?

A. No.

Q. This was simply another and different proposition, to sell his ontract to the Port Commission?

A. That was the way I understood it.

Q. That is the way you understood it at the time; an intent, for specific amount, to sell to the Port Commission his contract, and e wanted to induce you, as a sort of agent, to sell it to the Port Commission—induce the Port Commission to buy it—that is the vay you understood it?

A. That is right.

Q. Now, the Port Commission was, according to his theory, was o pay him $30,000 for his contract?

A. That is the way I understood it.

Q. And out of that $30,000 you were to have fifteen thousand?

A. He would give me one-half.

Q. That was the idea you gathered from what he said to you?

A. That was what he said to me.

Q. Did you have any row with him there?

A. None at all.

Q. You did not tell him that that proposition was an insult?

A. No. I said to him "Mr. Hays, you should know that you ould not make a proposition of that kind to me. You ought to now that I could not entertain a proposition of that kind." That was all I said.

219 Q. You knew, or at least you believed from your own knowledge of Mr. Hays, that he had more sense than to hink that such a proposition could be entertained?

A. No.

Q. How is that?

A. No.

Q. Well, I did not understand your reference then when you said hat Mr. Hays ought to have more sense than——

A. I did not say that; I said "You should know that I would ot entertain a proposition of that kind."

Q. That you would not entertain it—in other words, you knew hat Mr. Hays had sufficient intelligence to know that that kind of

a proposition was an insult to any honorable man to present to him, and that he ought to know that you would not and could not deal with it at all?

A. Yes.

Mr. Thompson: That is all Mr. Preston.

(Witness excused.)

Mr. Thompson: That is an entirely different proposition from what Mr. Bridges testified.

220 W. F. HAYS, recalled on behalf of plaintiff, testified as follows:

W. F. Hays: I want to be examined in the presence of the gentleman.

(Mr. Thompson:)

Q. Mr. Hays, you heard the testimony of Mr. Preston. If you ever had a meeting with Mr. Preston in which any suggestion of any sort was made either as to a sale of this property to the Commission or as to the taking over of the property or dealing for it in any way, state what that conversation was and where it occurred.

A. I went to Mr. Preston's office at the instance of General Chittenden, the President of the Port Commission, and submitted to him, as the attorney of the Port, the papers which I thought bore upon the proposition of the contract which I held with the state of Washington concerning the Smith's Cove Waterway. I informed Mr. Preston in that conversation that I believed the contract to be valid in all particulars. I pointed out as best I could, to aid him in his investigation, what had been done with reference to the contract—the decisions of the Supreme court of this state that related to the contract in some respects, direct or remote, and I did what I could to assist him in his official way as a lawyer to determine its legal status. Incidentally in the conversation, as I recall it quite distinctly, I told Mr. Preston that I would give the Port Commission fifty per cent of whatever profit I could derive under that contract if it would take it over and perform the entire contract, that I would accept it as my assignee to carry out the contract in its entirety and there would be a profit in that event of somewhere in the
221 neighborhood of half a million dollars, and of that sum I would give the Port of Seattle one-half.

Q. What was said, if anything, in that conversation about taking $30,000?

A. I never at any time, either in that conversation or at any other time, intimated to Mr. Preston or to anyone else that I would accept $30,000 for that contract, and how Mr. Preston remembers it that way I cannot understand. It is a marvel to me. I never offered to take from anyone under this contract, except to Mr. Gilman of the Great Northern Railway when we were figuring on arranging cer-

tain slips through their land, and to make a finished job of the improvement there for terminal facilities, in my discussion with Mr. Gilman I offered to take $250,000 from the Great Northern Railway Company if they would co-operate with me.

Q. Let us get back to the cross examination. What if anything did you offer Mr. Preston individually in connection with that matter, if he would induce the Port Commission to take over the contract?

A. Not one dollar.

Q. And what did you say, if anything, about giving him any percentage?

A. I never offered him any percentage. I never offered him a dollar. I never had any idea of having him serve me, except as he would serve me incidentally with the Port. The same is true of Mr. Bridges. I heard of this once before and, in a sense, I am glad it is called out now, but I cannot understand how such impressions could have been left in the mind of Mr. Preston or Mr. Bridges.

222 Q. Then in the fullest extent, without restriction or reservation, are you prepared to say to His Honor that never, directly or indirectly, did you offer any such bribe?

A. Never, directly or indirectly, did I offer to either of these gentlemen or to any other man in an official capacity a bribe of any kind or an attempted bribe or remote attempt at a bribe. I consider that a larceny and a felony and I never did such a thing.

(Witness excused.)

Thereupon the matter was taken under advisement by the court.

223 Thursday, September 2, 1915—10:00 a. m.

The Court: Are the parties ready to proceed in the argument in the case of Hays against the Port of Seattle?

Mr. France: If the Court please, at this time I would like to make a motion that Your Honor allow the case to be reopened to introduce about five minutes' additional testimony. The nature of the testimony that I wish to introduce is supplemental to testimony that was introduced in the case to this effect; that the Port of Seattle has expended on and adjacent to the Smith's Cove Waterway fully a million dollars, and I merely want to fix the time when that money was expended. That is, I desire to show that all of that money was expended between June, 1913, when this act in question went into effect, and November, 1914, when the suit was started.

The Court: Any objection?

Mr. Thompson: If it is only the introduction of the testimony of one witness we will make no further objection than the merely formal one to the character of the testimony, not to its being introduced at this time.

The Court: Very well, call the witness.

JOHN E. SHOEMAKER, produced as a witness on behalf of defendant, being first duly sworn, testifies as follows:

(By Mr. France:)

Q. State your full name, Mr. Shoemaker?
A. John Earl Shoemaker.
Q. You are assistant engineer of the Port of Seattle?
A. Yes sir.
Q. How long have you been employed in that capacity?
224 A. Since January 13.
Q. At my request you have looked up the amount of mone which was expended between June, 1913, and November, 1914, o the Smith's Cove Waterway by the Port of Seattle, and on its pro erties which adjoin that waterway, have you not?
A. I have.
Q. Just state the amount of money that was expended by the Po between June, 1913, and November, 1914, on all of its properti there, on the waterway and adjoining thereto.
A. The total amount was $765,635.74.
Q. And what portion of that was spent on improving the wate way itself?
A. The portion spent on the improvement of the waterway w $142,769.65.
Q. That was spent between June, 1913, and November, 1914?
A. Yes sir.

Mr. France: That is all.

Cross-examination.

(By Mr. Thompson:)

Q. I wish you would state of the last figures the amount that w expended on the waterway proper, the work?
A. Of the one hundred and forty-two thousand, etc.?
Q. Yes.
A. That was all spent on the improvement, dredging and slo protection of the waterway.
Q. That is all, I understood?
A. Yes.
Q. And that amount was what?
A. $142,769.65.
225 Q. The balance of the money was expended on the plant u there, the warehouse, etc.?
A. Property and warehouse.
Q. Now, the warehouse was situated on made ground, was it no or filled ground?
A. On filled ground, yes sir.
Q. Have you any figures as to the cost of that filling upon whic the property was situated?

Mr. France: I object, if the Court please, as not proper cross exam nation.
Mr. Thompson: I think it is, Your Honor. It is simply a divisio

of the different expenses that they expended. He gave in gross the expenses on the waterway, and in gross the other expenses. Now I want to see if he can divide it between the buildings, plant, and the filling up of the tide-flats which are covered by Mr. Hays' contract.

The Court: He may answer.

The Witness: You wish to know the cost of building the warehouse and shed?

Q. No, the cost of filling the ground upon which the warehouse was situated?

A. I did not look that up. It has been some time. I think it was probably the filling itself——

Q. (Interrupting.) Approximately?

A. Approximately fifty or sixty thousand dollars.

Q. How much?

A. Fifty or sixty thousand dollars.

Q. Fifty or sixty thousand dollars; the balance of the expenditure was on the buildings?

A. The buildings and foundations.

Mr. Thompson: I think that is all.

226 Mr. France: That is all.

(Witness excused.)

Mr. Thompson: There was a power of attorney from Frank Shea to Mr. Hays read in the evidence in the case, but I find that it has not been filed, and I would like to have the right to have it filed.

The Court: Let it be filed.

Mr. Thompson: It may be numbered as an exhibit.

(Document received in evidence and marked Plaintiff's Exhibit —.)

Mr. France: I forgot to ask Your Honor's permission to file some supplemental authorities.

Mr. Thompson: We have no objection to the Court having any authorities that can be produced.

The Court: Proceed with the argument.

(Argument.)

Indorsed: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 20, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

227 In the United States District Court for the Western District of Washington, Northern Division.

No. 47-E.

WILLIAM F. HAYS, Appellant,

vs.

PORT OF SEATTLE, a Municipal Corporation of the State of Washington; H. M. Chittenden, President; C. E. Remsburg and Robert Bridges, Commissioners of said Port of Seattle; W. V. Tanner, Attorney General of the State of Washington, and Seattle & Montana Railway Company, a Corporation, Respondents.

Citation to the Supreme Court.

United States of America to Port of Seattle, a Municipal Corporation of the State of Washington, The State of Washington and its Attorney General, W. V. Tanner; Seattle & Montana Railway Company, a corporation, and its Solicitor, Frederic G. Dorety:

You, and each of you, are hereby notified that in a certain cause in equity in the United States District Court for the Western District of Washington, wherein William F. Hays is petitioner, the petitioner therein has prayed an appeal to the Supreme Court of the United States from the decree in said cause entered, and that such appeal has been allowed; wherefore you are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, within sixty days from the date hereof, to show cause, if any there be, why the decree appealed from should not be reversed and set aside, and relief be granted to said appellants as by him prayed and as to justice and equity may appertain.

228 Witness, Judge of the District Court of the United States, this 5th day of April, 1917.

JEREMIAH NETERER,
U. S. District Judge.

Service of the within Citation to the Supreme Court hereby acknowledged this 5th day of April, 1917.

C. J. FRANCE,
Solicitor for Port of Seattle.
FREDRIC G. DORETY,
Solicitor for Seattle & Montana Railway Company, a Corporation.

Indorsed: Citation to the Supreme Court. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Apr. 5, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

229 In the United States District Court for the Western District of Washington, Northern Division.

No. 47.

WILLIAM F. HAYS, Complainant,

vs.

PORT OF SEATTLE, a Municipal Corporation of the State of Washington, et al., Defendants.

Precipe of Plaintiff for Record on Appeal.

To the Clerk of the Above Court:

Please incorporate, as Plaintiff's record on appeal, the following papers, copies of which are herewith furnished you by Plaintiff, together with a copy of the evidence taken in said cause, including Exhibits, to which, in said transcript of evidence, reference is made; stipulation heretofore having been duly entered and filed, authorizing the inclusion of said evidence, as taken at the trial, to be made a part of the record on appeal, to-wit:

Plaintiff's bill in equity;
Order to show cause;
Answer of the Port of Seattle;
Answer of Seattle and Montana Railroad Company;
Motion of the State to Dismiss; and Order thereon
Decree;
Petition for appeal to the Supreme Court;
Order allowing appeal;
Assignment of errors;
230 Citation to the Supreme Court;
Appeal Bond;
Order of the Court approving the Appeal Bond;
Transcript of Evidence and Proceedings, as taken in short hand and extended in long hand, by the Court Reporter, including Exhibits therein referred to, to be thereto attached, together with the stipulation of the parties concerning the record and extending the time in which to prepare and file the same, with all orders extending the time of appeal.

Respectfully,

WILL H. THOMPSON,
WILLIAM F. HAYS,
Solicitors for Complainant.

To the Defendants and Their Solicitors:

Take notice that the Complainant, Appellant, has prepared his precipe for the record in the above entitled cause on appeal, a copy of which is herewith served upon you, and the same will be this day filed in the above entitled Court.

WILL H. THOMPSON,
WILLIAM F. HAYS,
Solicitors for Complainant.

Receipt of a copy of the foregoing precipe is hereby acknowledge this 19th day of October, 1917.

C. J. FRANCE,
Attorney for the Port of Seattle.
F. G. DORETY,
Attorney for the Seattle & Montana Railway Company.

Indorsed: Praecipe of Plaintiff for Record on Appeal. Filed the U. S. District Court, Western Dist. of Washington, Oct. 19, 191 Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

231 United States District Court, Western District of Washington, Northern Division.

No. 47-E.

WILLIAM F. HAYS, Plaintiff,

vs.

PORT OF SEATTLE, a Municipal Corporation of the State of Washington; H. M. Chittenden, President; C. E. Remsburg, and Robert Bridges, Commissioners of said Port of Seattle; W. V. Tanner, Attorney General of the State of Washington, and Seattle & Montana Railway Company, a Corporation, Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten record numbered from 1 to 235, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of said cause, pursuant to an appeal filed in the Clerk's office of the United States District Court for the Western District of Washington, Northern Division, in a proceeding therein, entitled William F. Hays vs. Port of Seattle, Inc., et al., and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court and that the same constitute the record on appeal from the

232 Decree of said United States District Court for the Western District of Washington to the United States Supreme Court.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the Plaintiff for making record, certificate or return to the United States Supreme Court in the above entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S.) for making record, certificate or return 578 folios at 15c	$86.70
Certificate of Clerk to transcript of record—4 folios at 15c.	.60
Seal to said Certificate	.20
Certificate of Clerk *ot* original exhibits, 3 folios at 15c	.45
Seal to said Certificate	.20
Total	$88.15

I hereby certify that the above cost for preparing and certifying record amounting to $88.15, has been paid to me by William F. Hays, one of attorneys for Plaintiff.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

In witness whereof I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 13th day of March, 1918.

[Seal United States District Court, Western District of Washington.]

FRANK L. CROSBY,
Clerk U. S. District Court.

233 United States District Court, Western District of Washington, Northern Division.

In Equity.

No. 47.

W. F. HAYS, Complainant,

v.

PORT OF SEATTLE, a Municipal Corporation, Defendant.

Filed September 17, 1915.

Will H. Thompson, for Complainant.
France & Holsell, for Defendant.

NETERER, *District Judge:*

The complainant seeks to declare inoperative and unconstitutional, as violative of the provisions of the federal constitution, "an act vacating a portion of Smith's Cove Waterway in the City of Seattle," approved March 11, 1913. He alleges, in his bill, in substance, that the defendant, Port of Seattle, is a municipal corpora-

tion of the state of Washington created by legislative act of the State, Laws 1911, p. 412-426, by which act the creation of Port Districts and election of Port Commissioners is authorized; and further alleges that on the 3rd day of August, 1895, the Commissioner of Public Lands, pursuant to an act of the legislature of Washington, Laws 1893, p. 241, entered into a contract with the complainant, W. F. Hays, and one Frank Shay, for the excavation of that certain public waterway known as Smith's Cove Waterway, in Seattle harbor, and the filling in and raising above high tide of all of the lands covered by said contract situated in said Smith's Cove adjacent to said waterway belonging to the State of Washington. That bond was filed and all of the provisions of the said act complied with; that on the 25th day of July, 1895, Frank Shay, for valuable consideration, sold and assigned to com-
234 plainant all of his right, title, and interest in and to the application for contract and in and to any and all contracts made thereunder, and on the 7th day of March, 1896, Frank Shay, duly assigned and transferred to complainant all of his right and interest in contract "so modified" and said assignment was filed with and accepted by the bondsmen and by the Commissioner of Public Lands. That on the 4th day of May, 1896, the complainant entered upon the performance of his contract, and commenced driving piles for the construction of the bulkhead as required by said contract, and did other acts in preparation for such work, and on the 5th day of May, while so at work performing his part of said contract, he was notified by the Commissioner of Public Lands of the State of Washington, "as was his right under the law," that he had elected to exercise the right provided by said contract of changing the said form of bulkhead to be used by complainant, under the terms of said contract; and that complainant thereupon ceased operations until plans and specifications should be determined upon. It is further alleged that by the terms of said contract the State was to furnish certain right of way for the construction of said waterway across the peninsula separating Smith's Cove from Salmon Bay, and that the State failed to provide such right of way. That complainant applied to the Commissioner of Public Lands of Washington from time to time for specifications and a plan of bulkhead practicable for said waterway, and to furnish a right of way across said peninsula, and that at no time was a plan for bulkhead provided or the right of way furnished and that the State failed to have the tide lands appraised as provided by the act of 1893, and that the defendant, the Seattle & Montana Railway Company, known as the Great Northern Railway Company, purchased from the State from time to time and from divers persons, a large area of said tidelands at their nominal or appraised value, long after the making of the contract aforesaid; and that a conspir-
acy between the defendant Railway Company, its officers,
235 agents and servants, and the Commissioners of the defendant Port Commission, to defeat the contract of the complainant, and as a part of such conspiracy and in order to escape the

payment of said cost of filling said lands, its officers and agents, actively assisted and joined wtih said Commissioners or some of them, in obtaining the enactment into law of the act in issue. That after said act became law, the defendant Port Commission wrongfully took possession of said waterway and has exercised acts of absolute ownership of said waterway without compensation to the complainant; that it has constructed and built along the sides of said waterway upwards of 10,000 feet of so called bulkhead, contrary to and different from the bulkhead required by complainant's contract, which complainant will be required to remove in order to perform his contract, adding a necessary cost of at least $8.00 per lineal foot to the damage of complainant of at least $80,000; and further states that the defendant Port Commission has wrongfully, pursuant to said act constructed in and across said waterway at Garfield Street, a distance of 400 feet, a so called bulkhead, consisting of piles driven therein to great depths and brush interlocked, totally obstructing thereby all navigation of said waterway beyond Garfield Street, "which will cost complainant at least the sum of $5,000.00 to remove," and has wrongfully removed, "earth from about one-half of said waterway at the outer end thereof at what is known as deep water, and extended thereon to said Garfield Street and placed the same in said waterway at the inner end thereof at and beyond said bulkhead therein at said Garfield Street," and "that there were at least $1,500,000 cubic yards of earth so wrongfully removed, taken and deposited as aforesaid, necessarily entailing an added cost for its removal over and above what it would have cost this complainant of at least Seventy-five Thousand Dollars ($75,000.)"; and charges that the act of March 11, 1913, supra, is violative of Section 10, Art. 1 of the Constitution of the
236 United States, and of Article 14, Section 1 of the Amendments to the Constitution of the United States.

A judgment of non suit has been entered in favor of the defendant, Seattle & Montana Railway Company, upon the proofs being taken on the part of complainant, and on motion of complainant, the action dismissed against the Attorney General of the State.

The Port Commission answers, and denies practically all of the allegations of the bill of complaint. It denies that the complainant is entitled to any relief whatever; admits that sundry and divers tracts of tidelands were sold by the state at their appraised value; and admits that since the passage of said act the Port of Seattle has engaged in works of harbor improvement. There is no evidence tending to show any conspiracy.

Many objections were urged upon the taking of testimony with relation to the execution of the contract and the respective interest of the parties, and some emphasis placed upon the fact that Shay at the time of execution of the contract, August 3, 1895, had, on July 25, 1895, disposed of all his interest in the application for contract as appears from assignment offered in evidence, and while his name appears signed to the contract, it is admitted upon the trial by W. F. Hays, the complainant, that he signed Shay's name to the contract, claiming that he at that time was the duly authorized attorney in fact

of Shay, pursuant to the letter of attorney which is filed in evidence, which, however, shows that it was executed and acknowledged on the 2nd day of March, 1896. Reference to the modified contract which is approved by the Governor shows that this was signed by Hays, Shay and Forrest, the Land Commissioner, on the 26th day of February, 1896, being several days prior to the date of the letter of attorney, while the contract originally was signed August 3, 1895. This contract was approved by Governor McGraw on the 7th day of March, 1896. Mr. Hays, in signing Mr. Shay's name to the contract,
237 did not sign it as attorney in fact. The bond which was filed in support of this contract as provided by law was signed by complainant and by Mr. Hays as attorney in fact for Mr. Shay. It is contended that this contract was in fact never executed by the applicants under the notice and application to fill in these tide lands pursuant to the act of 1893, and there being no enforceable contract, that no legal proceedings could be taken thereunder. It is further contended by the defendant that the controlling consideration for the execution of the contract in its modified form which bears the approval of the Governor of the State and which is necessary to give it vitality, was the recital in the modified contract as executed, which is:

"Whereas, in the opinion of the Governor of the State, it would be detrimental to the interest of the State to enter into a contract with said W. F. Hays and Frank Shay, or with either of them, or with any other person or persons, corporation, or corporations, to excavate the above mentioned waterway, except upon the express terms and conditions, as the principal consideration, that said contractors would undertake at their own cost and free of cost to the United States of America, the State of Washington, the County of King, and the City of Seattle, to excavate the waterway extending from the north end of said waterway and across the peninsula separating Smith's Cove from Salmon Bay, such excavation to be made under the supervision and in accordance to the plans of the engineer to be designated by the State or the United States, said waterway, when excavated, to be owned, possessed and controlled by the United States of America or by said State, free of cost to the said State or United States whenever said State or United States shall demand possession of the same."

and that the selection of the route for the Lake Washington Canal by the government other than the route from Salmon Bay to Smith's Cove, eliminated entirely the proposed canal across the peninsula from Smith's Cove to Salmon Bay, and that upon the selection of the route, the State declined to further proceed under the contract, and the claimant likewise realizing and appreciating that the contract for the excavation of the waterway and the extension of the project across the peninsula from Smith's Cove to Salmon Bay was one project, declined to proceed, and he stated, "Every one knew that the government canal was a part of the project and it had to be worked together," and stated to Land Commissioner Calvert, that he
238 could not proceed with the contract until the right of way was obtained by the State for the canal. On November 2, 1901,

and Commissioner Calvert wrote to complainant, "that the State of Washington will not, under any consideration, furnish the right of way over the peninsula as referred to in your modified contract; nor will the State in any way bind itself to pay you the cost of the right of way if obtained by you." No steps were ever taken by the complainant to compel the State to obtain its right of way; nor did he act under the provisions of the modified contract which authorized him to proceed, obtain the right of way, and perform the excavations necessary to complete the filling of the lands described in the contract and require payment on the part of the State as by the terms and provisions of the contract provided. The provision referred to reads as follows:

"In consideration of the foregoing provisions of the contract as herein modified, the said W. F. Hays * * * hereby further agree and covenant * * * that they will excavate the lands across said peninsula * * * in so far as said excavation shall be necessary to complete the filling of the lands described in the foregoing contract as herein modified, at their own personal cost and expense, and when the work of such filling and excavation shall have been completed * * * the said W. F. Hays * * * hereby agree to turn over to the State of Washington or to the United States, either or both, upon its or their demand therefor * * * said excavation and right of way, free of cost to said State or United States, and clear of any lien or liens thereon, if the right of way and the privilege of so excavating across the said peninsula shall be accorded to the parties of the second part * * * free and clear of any cost or expense to them therefor."

It is contended the phrase "if fair compensation shall be made to them therefor, which compensation, if not mutually satisfactory, shall be submitted to arbitration," authorized the complainant to obtain the right of way and be compensated therefor prior to turning the completed work over to the State or to the national government, and this contention does not appear to be without merit, as clearly the only construction that can be placed upon the language employed would carry such a conclusion. The conclusion reached as hereafter stated makes it unnecessary to pass upon the foregoing contentions.

239 It is further contended on the part of the defendant Port Commission that complainant was required, under the law which authorized the contract under which he is proceeding, to prepare maps, specifications, etc., with relation to the work for the retaining walls in the waterway, and that since complainant concedes that it was the right of the Land Commissioner to change the form of bulkhead specified in the original contract, that the duty immediately devolved upon the complainant, upon the suggestion of Land Commissioner Forrest, on May 12th, 1896, confirmed by letter of June 9th, in which he says:

"You will recall the conversation we had at the Butler Hotel in Seattle on or about May 12, last. In that conversation I told you that Mr. Gillis, engineer for this department, had reported to me that nothing less substantial than a stone bulkhead would answer the purpose in the improvement of Smith's Cove Waterway, contemplated by you."

to prepare and tender specifications covering the work. This duty became more emphatic on November 17, 1898, when Land Commissioner Bridges, by letter, stated that:

"The plans for retaining wall are utterly impracticable and without merit. Owing to the height to which the retaining wall must be built (some 28 feet) along the outer face of the embankment, its exposed position and the great values dependent on its integrity for their existence, you are hereby notified to submit plans, specifications and estimates for a stone wall. The retaining wall for the interior of the waterway could, properly, be made of brush on the same plan as the Lake Washington Water Way Co.; but for the retaining wall in front, a distance of 9,000 feet, it will require about 200,000 cubic yards of rock; the remaining wall, 5,500 feet, may be of brush after approved plans."

to which, on December 2nd, following, complainant, in reply, says:

"I beg to state in the first place that after careful examination of the law under which the contract referred to was entered into with the State and the terms of the contract itself, I am forced to the conclusion that any plan of a stone wall, as suggested in your letter, would entail such an excess of expense upon the lands to be thereby impounded as to amount to a practical confiscation and unless the burden of expense for such a structure be borne by the state out of some specific fund authorized for such purpose, I cannot see the reason for submitting plans contemplating such a change from the one provided in the contract."

"If you desire me to furnish plans for a bulkhead, or retaining wall, to increase in point of strength the one provided for in the contract (which experience has shown to be sufficient and practicable for the purposes required under said contract) I shall be——

240 On December 17, 1898, complainant again wrote to Commissioner Bridges as follows:

"It was my intention, on Thursday of this week, when in Olympia, to have had a further talk with you relative to the matter of proposed change in bulkhead, also as to the cut between Salmon Bay and Smith's Cove. Of course you understand, that the State imposed as a condition precedent to the Governor's approving the contract, that I should make that cut, the right of way to be of course provided by the state. This has not yet been done and I would like to do anything I can to have this obtained and settled as the matter of bulkhead or details as to the work will naturally adjust themselves. I speak of this because I am satisfied that the contract is an entirety, and unless it is susceptible of performance on both the sides of the state as well as myself, its opponents will resort to and obtain injunctive relief."

I think that by the provisions of Section 5 of the Act under which this contract was authorized, Laws 1893, p. 244, it was encumbent upon the complainant upon being notified by the Land Commissioner as to the change of bulkhead which was required, which it is conceded was the Land Commissioner's right, to furnish plans and

specifications pursuant to the suggestion, and especially upon the suggestion of Land Commissioner Bridges, wherein it was specifically pointed out that the retaining wall for the interior of the waterway could properly be made of brush on the same plan as the Lake Washington Waterway Co. and that the wall in front for the distance of 9,000 feet would require about 200,000 cubic yards of rock, and that the remaining part of the wall, 5,500 feet "may be made of brush after approved plans"; or to proceed with the work, taking the letter as a modification of the specification in the manner suggested and in connection with the plans and specifications submitted upon the contract; and I believe it was the complainant's duty to do so, and when he failed to proceed with the work in accordance with the suggestions of Commissioner Bridges, within the time limited by law or contract, that he has not now a right to complain. Under this law, and under the contract, the complainant could not merely *contend* himself with an occasional letter or correspondence with reference to the contract and the specifica-
241 tions and indefinitely prolong the contract or keep alive any rights which he may have had. The testimony of Mr. Cryderman, an engineer of many years' experience, and the testimony of Mr. Gillis, his predecessor, both of whom are engineers of renown, was to the effect that nothing less than a stone bulkhead would do, and upon the suggestion of Mr. Gillis, Land Commissioner Forrest was prompted to make the change, and Mr. Cryderman advised Land Commissioner Bridges; and no fact appears in the evidence, which, to my mind, excuses the complainant in not proceeding with the work or being more diligent in the assertion of any right which he may have had. No act appears in the record, done by complainant, with relation to this contract, except application to the Supreme Court, December 16, 1903, for writ of mandamus to compel Land Commissioner to appraise the tide lands, until November 12, 1914, when a protest to the vacation of Smith's Cove Waterway was filed with the Land Commissioner, two days before the beginning of this action, and but little was done prior to that time.

The act which is sought to have declared unconstitutional, Laws 1913, page 195, reads:

(Title.)

"An Act vacating a portion of Smith's Cove Waterway, in the City of Seattle, and vesting the title of the vacated portion in the port of Seattle.

Be it enacted by the Legislature of the State of Washington:

Section 1. That all of that portion of the Smith's Cove Waterway, in the City of Seattle, north of the southerly line of Garfield Street in said city of Seattle, as the same appears upon the plat of said city, be, and the same is hereby, vacated as a waterway of the State of Washington.

Section 2. After the date of the passage and approval of this Act, and the time when the same shall become effective, the title to all of

that portion of the said Smith Cove waterway hereby vacated sh
be vested in the Port of Seattle. Provided, however, That befo
such vacation shall become effective, or the title to said proper
shall vest in said port of Seattle, the said port of Seattle shall pr
cure the consent of all owners of property abutting upon the sa
waterway of said vacation, but the said port of Seattle shall poss
no right to acquire any such consent by exercise of the power
eminent domain, or by any proceedings whatever, against the wi
of any such abutting owner."

242 By this act, it is contended, the State attempted to repud
ate its contract with the complainant, in violation of Artic
I, Section 10 of the Federal Constitution, and also in contraventio
of the 14th amendment to the Constitution. I do not think it ca
be seriously contended that any rights guaranteed by the 14t
amendment are invaded; nor do I think that this act impairs an
of the obligations of complainant's contract. The act deals onl
with the subject matter of the contract, and not with any of th
obligations. None of the provisions of the contract are in any wa
referred to or limited. It does, vacate a part of the waterway i
cluded in the contract of the complainant. It does vest the title t
the vacated part of the waterway in the defendant Port of Seattl
It in no way limits the obligation of the State under the contrac
nor attempts to restrict any of the rights of the complainant wit
relation to the contractual obligations. The stipulations of the co
tract are not impaired.

"The term 'obligation' has been treated in extenso by man
learned moral and civil writers and has been somewhat mystifie
by classification, and its correct use in connection with the variou
and numerous subjects in which it has been applied has not alway
been very clearly established; but the term, when used in relatio
to contracts is neither mystical nor doubtful, and its meaning
well understood by the lawyers. 'Oligatio ex contractu' and 'obl
gatio ex juris vinculum' are terms of the Roman law with well d
fined meaning. 'Obligatio' is to bind. Obligation implies a du
and a duty that may be enforced by law to perform the contract a
cording to its terms. The constitution of the United States uses th
term in this sense when it prohibits the enactment of laws impai
ing the obligation of contracts."

Wachter v. Famachon, 22 N. W. 160.
Words & Phrases, Vol. 6, p. 4483.

The obligation of a contract is the duty of performance. It
the binding force, coupled with the means and right of enforc
ment or power to compel performance. The obligation of a co
tract is and can be nothing less than that which obliges a person
perform his contract or repair the injury done by a failure to pe
form it. It is created by the terms of the agreement, su
243 ported by legal and moral principles, and exists in acts
the parties, and is determined by the language employed
and the mode of enforcing emanates from the law making bod

which may be exercised at its discretion, within the prescribed limites of the constitution. Bridge v. Bridge, 11 Peters, 420. The act in issue does not take from the binding force of the contract, nor limit it in its operation; nor take from the means of enforcement or liability to respond in damages for violation of the terms of the contract. All of the obligations of the contract remain, and the act does not attempt to impair them. The most that can be said is that the State vacated a part of the waterway and vested title thereto in the Port Commission. This may violate rights which accrued under the contract, but it does not impair its obligation. If the rights of complainant have been violated, he must look to the State, and his remedy is open under Section 886 Rom. & Bal. Codes of Wash. Lord v. Thomas, 64 N. Y. 107; Brown v. Colo. 106 U. S. 95; Caldwell v. Donaghey, 156 S. W. 839, 45 L. R. A. 721.

After the passage of this act, the Port Commission entered upon an extensive improvement and expended in improvements on its properties on the waterway and enjoining, the total sum of $765,535.74. The amount expended on the improvement of the waterway itself was $142,769.65.

The issue tendered is determined by what has been said, and it is not necessary to discuss the good faith or diligence with relation to this contract during the more than nineteen years that have elapsed since the Land Commissioners advised "that nothing less substantial than a stone bulkhead would answer."

An order may be presented dismissing the bill.

JEREMIAH NETERER, *Judge.*

244 UNITED STATES OF AMERICA,
Western District of Washington, ss:

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that I have compared the foregoing copy with the original Decision filed September 17, 1915, in the foregoing entitled cause, now on file and of record in my office at Seattle, and that the same is true and perfect transcript of said original and of the whole thereof.

Witness my hand and the seal of said Court, this 14th day of March, 1918.

[Seal of the United States District Court, Western District of Washington.]

FRANK L. CROSBY, *Clerk,*
By ED M. LAKIN, *Deputy.*

[Endorsed:] No. 47-E. In the District Court of the United States for the Western District of Washington. W. F. Hays, Complainant, vs. Port of Seattle, a Municipal Corporation, Defendant. Certified copy of Decision.

245 In the United States District Court for the Western District of Washington, Northern Division.

No. 47-E.

WILLIAM F. HAYS, Appellant,

vs.

PORT OF SEATTLE, a Municipal Corporation of the State of Washington; H. M. Chittenden, President; C. E. Remsburg and Robert Bridges, Commissioners of said Port of Seattle; W. V. Tanner, Attorney General of the State of Washington, and Seattle & Montana Railway Company, a Corporation, Respondents.

Citation to the Supreme Court.

United States of America to Port of Seattle, a Municipal Corporation of the State of Washington; the State of Washington and its Attorney General, W. V. Tanner; Seattle & Montana Railway Company, a Corporation, and its Solicitor, Frederic G. Dorety:

You, and each of you, are hereby notified that in a certain cause in equity in the United States District Court for the Western District of Washington, wherein William F. Hays is petitioner, the petitioner therein has prayed an appeal to the Supreme Court of the United States from the decree in said cause entered, and that such appeal has been allowed; wherefore you are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, within sixty days from the date hereof, to show cause, if any there be, why the decree appealed from should not be reversed and set aside, and relief be granted to said appellants as by him prayed and as to justice and equity may appertain.

246 Witness, the Judge of the District Court of the United States, this 5 day of April, 1917.

JEREMAH NETERER,
U. S. District Judge.

247 [Endorsed:] Original. No. 47. In the United States District Court for the Western District of Washington, Northern Division. William F. Hays, Appellant, vs. Port of Seattle, etc., et al., Respondents. Citation to the Supreme Court. Will H. Thompson and William F. Hays, Solicitors for Complainant, Appellant in Error. Service of the within Citation to the Supreme Court, hereby acknowledged this 5th day of April, 1917. C. J. France, Solicitor for Port of Seattle. —— ——, Attorney General for the State of Washington. Frederic G. Dorety, Solicitor for Seattle & Montana Railway Company, a corporation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Apr. 5, 1917. Frank L. Crosby, Clerk, by Ed M. Lakin, Deputy.

Endorsed on cover: File No. 26397. W. Washington D. C. U. S. Term No. 389. William F. Hays, Appellant, vs. Port of Seattle, The State of Washington et al. Filed March 22d, 1918. File No. 26397.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919

WILLIAM F. HAYS,

Appellant,

vs.

PORT OF SEATTLE, THE STATE OF WASHINGTON, ET AL.,

Respondents.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON JEREMIAH NETERER, Judge

Brief of Appellant

STATEMENT OF RECORD

This is an appeal to the Supreme Court of the United States from the District Court of the United States for the Western District of Washington, Northern Division.

Citations are to pages of the printed Record, unless otherwise stated.

Decree of District Court, Record 21.
Opinion of District Court, Record 133-141.

As the Appellant's case consists of property rights, arising out of a contract between appellant and the State of Washington, pursuant to a statutory procedure, a brief summary of the Complaint and Record seems desirable.

After formal allegations, descriptive of the parties to this suit, the proceeding being one in equity, the bill in substance shows:

That the tidelands of the State of Washington became the property of the State by virtue of its sovereignty, and by an Act of March 26th, 1890 and amendatory Act thereto of March 26th, 1895, Chap. 178, pp. 527-571, Laws of Washington; said lands were duly plated and appraised for sale and sold by the State, in contemplation that the said tidelands would be filled in by excavation of waterways by private contract, and reclaimed from the ebb and flow of the tide at the expense of the purchasers of said lands from the State of Washington under Act of March 9th, 1893, see Laws of Wasaington 1893, pp. 241-246, entitled "Excavation of Waterways by Private Contract", and also an Act amendatory of Section 4 of an Act approved March 28th, 1890 to establish Public Ways for Water Craft

Across Tide Flats, approved February 20th, 1893, page 26 Chap. 17, Laws of 1893.

Appellant and Frank Shay of California, on or about the month of June 1895, duly published notice and complied with all the preliminary requirements of said Act so as to entitle them to a contract to excavate that certain waterway in Seattle Harbor known as the "Smith's Cove Waterway", as appears upon the State's recorded plat and map thereof, showing its dimensions together with description of the tidelands through which it runs, including the adjacent tidelands to be filled by the earth to be excavated from said "waterway". Said notice under said "Act", subjected all said lands to the future lien of the contractor, for the cost of excavating said "waterway" and the filling in of said adjacent tide lands, pursuant to and under any and especially the said contract, it being provided by said Act that the purchaser of said lands from the State took with knowledge of said improvement and *subject* to such future lien for the cost of filling the same.

That the said Shay, for a valuable consideration on the 25th day of July, 1895, assigned to appellant all his right in and to said application for the contract; that said contract was finally approved by the Governor, and entered into on the 7th day of March, 1896, and the said Shay on or about the last above date, assigned all his right, title and in-

terest in and to said contract to this appellant, see R. pp. 32 and 118.

The contract meant an added value of seven million cubic yards to the lands, at a cost of upward of $1,300,000.00 over the appraisal price the State was to sell them for, see R. p. 111 (testimony defendants witness Engineer West).

Said contract contained definite plans and specifications for a retaining wall or bulkhead of wood material marked A and B, C, D and E, filed with said proposed contract, all of which under said Act subject to the aproval of the Governor, was thereafter duly approved by him and entered into as aforesaid on the 7th day of March, 1896. See Plaintiff's Exhibit 1, also R. p. 31.

That appellant commenced work in accordance with the terms of said contract on the 4th day of May, 1896 but appellant was required by the State on the 5th day of May, 1896, to suspend work on the alleged claim of a purported *change in the plan of bulk heads;* see R. p. 33, also R. p. 96. (Evidence of Forrest, the Commissioner of Public Lands.) Also see R. pp. 33-37, *Hays v. Hill,* 23 Wash. 741.

The contract shows appellant is required as a condition precedent, to excavate across the peninsula to Salmon Bay, (being upland,) at his own cost, the proposed cut, however, was so accepted by the State and this appellant. See Ex. 1.

That appellant was at all times thereafter, prevented by the State by one excuse and then another, from the prosecution of the work under said contract, but appellant at all times was ready and insistent that the State permit him to proceed with the work of excavating said waterway and the filling of said tide lands, but the State ever thereafter failed to *fix a plan of bulkhead* in conformity with the one contemplated under said contract, or at all, or to permit appellant to proceed with the work under said contract and owing to that provision of the contract requiring appellant to excavate the extension to connect with the proposed Government canal across the neck of land lying between Smith's Cove and Salmon Bay, and the refusal of the Secretary of War to act, appellant could not legally compel the State to act, either in the matter of providing the "right of way" across said neck of land between Smith's Cove and Salmon Bay, as required by said contract, or to furnish the appellant with any other form of bulkheads, appellant notwithstanding, stood ready at all times to perform the work under said contract, when permitted by the State to do so as aforesaid. That appellant after his work has been so suspended, applied to the State thereafter from time to time, and to each successive State Land Commisisoner for the State of Washington, to furnish a plan for such proposed change of bulkheads, (such officer being by law the official head in charge of and having exclusive juris-

diction over said contract and the character of bulkheads and the tidelands covered by it), until he was finally compelled to bring this action.

That appellant concurrently with the making of said contract, duly executed a bond payable to the State in the sum of $25,000.00 as a guarantee of his faithful performance of said contract which bond was duly approved as aforesaid and thereafter appellant was compelled, in order to maintain the integrity of said contract, to prevent unlawful encroachments upon said waterway and said tidelands, to prosecute a suit at his own expense against J. J. Hill and the Seattle and Montana Railway Company, known as the Great Northern Railway Company, said case being reported in the 23rd Wash., pp. 730 to 742 inc. See also R. pp. 109-110 Defendant's Exhibit "O".

The Bill further charges that the said Seattle and Montana Railway Company known as the Great orthern Railway Company, its officers, agents and servants, prior to the bringing of this action, entered into a conspiracy with the commissioners of this defendant, Port of Seattle, to *defeat* said contract and the performance thereof, to deprive this plaintiff of the benefits thereof and to escape the payments to the State for said improvements so contemplated under said contract, see R. pp. 7-8, and promoted the enactment of House Bill No. 478 approved March 11th, 1913, Chap. 59, p. 195 Laws

of Washington, by said Act conveying said waterway to this defendant Port of Seattle to prevent this appellant from performing said contract, see R. p. 8.

One of the conditions of said Act, so *vesting title* to said waterway in said Port of Seattle was "that said Port shall *procure* the *consent* of all owners of property abutting upon said waterway of said vacation," and further provided that "said Port of Seattle shall possess no right to acquire any such consent by the exercise of the power of eminent domain", said Bill alleges that the defendant Port of Seattle did not after the passage of said "Act" or at any other time, obtain the consent of plaintiff for the vacation of said waterway or any part thereof. That plaintiff was at all times the owner of said contract, and by virtue thereof was and is the exclusive owner of all and every right in and to said waterway and the right to fill in the lands so abutting thereon at 15% profit, and that the passage of said "Act" was the wrongful taking of his property without *due process of law*,—that this defendant Port of Seattle has under said "Act" wrongfully taken possession of said waterway to his damage as charged. See R. pp. 8-9. The Bill further charges that said Port of Seattle was threatening to dispose of portions of said waterway to said Railway Company, and plaintiff asked for injunctive relief, etc., see R. pp. 8-11. The defendants joined

issue and after a trial on the merits, the court refused any relief and dismissed the Bill. See R. p. 21.

ASSIGNMENT OF ERRORS

Comes now the petitioning appellant, and files the following Assignment of Errors on which he will rely in the prosecution of his appeal in the above entitled cause to the Supreme Court of the United States from the District Court of the Western District of Washington, Northern Division:

I.

The court erred in holding that the complainant, appellant in error, was directed between the years 1896 and 1899 by various land commissioners of the State of Washington, to change the form of the bulkhead specified in the original contract.

II.

The court erred in holding that it was the duty of complainant, to prepare and tender specifications covering the "changed" form of bulkhead as directed by the various land commissioners of the State of Washington.

III.

The court erred in holding that complainant, appellant in error, neglected and refused to furnish plans and specifications pursuant to such direction.

IV.

The court erred in holding that complainnat, appellant in error, had forfeited and lost all rights which he had under the contract between himself and the State of Washington.

V.

The court erred in holding that complainant had lost all rights under said contract by reason of his laches.

VI.

The court erred in holding that complainant was guilty of laches in failing to assert his rights, "if any he had", under said contract.

VII.

The court erred in holding that the act in issue and set out in appellant's bill in *haec verba,* did not violate any constitutional right of the complainant, appellant in error.

VIII.

The court erred in dismissing the bill of complainant, with prejudice, and in entering judgment in favor of the defendant, Port of Seattle, respondent herein, for its costs and disbursements in said action.

IX.

The court erred in dismissing the bill of com-

plaint, upon motion of the State of Washington, by its Attorney General.

X.

The court erred in dismissing the bill of complainant as against the defendant, respondent in error, Seattle & Montana Railway Company.

XI.

The court erred in holding in effect that the contract of complainant with the State was self "forfeiting and void."

XII.

The court erred in holding, in this collateral proceeding, that the contract was "forfeited" because complainant did not furnish further and different "plans and specifications", from those contained in the contract, as suggested in the Bridges letter dated November 30, 1896.

XIII.

The court erred in finding in this collateral proceeding that complainant's contract was forfeited, under the Bridges letter in 1896, contrary to and in disregard of the decision of the Supreme Court of the State of Washington, rendered January 9, 1901, *Hays v. Hill, et al,* reported in 23 Wash. p. 741; long after Bridges had gone out of office, and more than five years after the Bridges letter, therein holding in a direct attack upon said contract,

that "the contract in the meantime is in a state of suspension."

XIV.

The court erred in not holding, that House Bill No. 478, State of Washington, approved March 11, 1913, being an "Act, vacating a portion of Smith's Cove Waterway in the City of Seattle, and vesting the title of the vacated portion in the Port of Seattle", is the taking of complainant's property without due process of law, and is vioaltive of Article XIV, Section 1 of the Amendments to the Constitution of the United States, and that complainant is without any remedy except in a Court of Equity.

XV.

The court erred in holding that House Bill No. 478, State of Washington, approved March 11, 1913, being an "Act vacating a portion of Smith's Cove Waterway in the City of Seattle, and vesting the title of the vacated portion in the Port of Seattle" is not the taking of complainant's property without due process of law, and is not violative of Article XIV, Section 1 of the Amendments to the Constitution of the United States, and in not holding that complainant is without any remedy except in a Court of Equity.

XVI.

The court erred in not granting the relief de-

manded in complainant's bill and in not entering judgment for complainant therefor.

XVII.

The court erred in refusing plaintiff's offer of the testimony of the witness Frank T. Hunter (tending to show a conspiracy between certain of the defendants), to defeat plaintiff's rights by the passage of the Act, House Bill 478. See R. pp. 64-67.

XVIII.

The court committed error in refusing to permit the appellant's witness Hunter to give evidence as relates to Exhibit 24, tending to establish the conspiracy as charged, (see R. 64-67).

Questioned by Mr. Hays:

Q. Now, Mr. Hunter, you say you received no answer to that letter (Ex. 24) you addressed to the defendant Port of Seattle?

A. I did not.

Q. And then later you re-assigned this contract. State what your reasons were for turning back this contract.

A. Turning the contract back to you?

MR. FRANCE: I object to that as irrelevant, immaterial and incompetent.

THE COURT: Objection sustained.

MR. HAYS: I have charged—

THE COURT: I do not care to hear from you upon it. We do not care why he turned it back; all we are concerned with is whether you own it now or not. Proceed.

MR. HAYS: Pardon me this suggestion, but I have charged in this bill that there was a conspiracy between the railroad comany and the Port of Seattle in the passage of this law, by which the waterway should be eliminated.

THE COURT: I do not care to hear from you. You stated that you turned it back because of that bill. (To which ruling plaintiff excepts, which exception is allowed.) See R. pp. 66-67.

MR. HAYS: I want to show that the railroad company positively said things, which would prevent the parties from going on with the contract. It is only an element to show the possibility of the conspiracy that is alleged in the Bill. Of course, I realize it is only fragmentary, but it is an element worthy of consideration, at least.

THE COURT: Proceed with the cross-examination. (To which plaintiff excepts, which exception is allowed). See R. pp. 66-67.

ARGUMENT

Appellant seeks a reversal of the decree herein and a *permanent injunction* against the Appellees, the Port of Seattle in particular, and the Great Northern Railway, its grantee, restraining them from exercising rights of ownership over the waterway covered by and described in that certain contract between this appellant and the State of Washington. This record shows that the appellee, the Port of Seattle, and its co-defendant railway company, are asserting ownership and possessory claim of right to said waterway solely under said "Act" in derrogation of the rights of appellant, a true copy of said Act being set forth in paragraph 9 of plaintiff's bill.

This appellant specifically complains and points out that said "Act" violates the "due process" clause of the 14th Amendment to the Constitution of the United States through and by which appellant has been deprived of his property and, that said "Act" is unconstitutional and void.

The State of Washington had power to enter into the contract involved in this suit, and it is valid.

Hays v. Hill, 23 Wash. 730.
Hays v. Calvert, 36 Wash. 138.

The right of the State to make such contract is upheld:

Allen v. Forrest, 8 Wash. 700.
Scholff v. Forrest, 11 Wash. 640.
Mo. Val. & Trust Co. v. Hofius, 20 Wash. 272.

The contract gave to appellant a vested property right in and to the said waterway from the time said contract was entered into and the approval of the Bond guaranteeing for appellant its performance, and the record shows that aappellant, without any duty on his part, express or implied, in order to safeguard his rights as also the rights of the State under said contract, prosecuted at great personal expense two suits to the highest court of the State of Washington the first viz:

Hays v. Hill, 23 Wash. 730.

See Defendant's Exhibit O.

Second suit, *Hays v. Calvert,* 36 Wash. 138.

In said suit, *Hays v. Hill, et al,* (brought long after the colloquies of Commissioners Forrest and Bridges) it is shown that Mr. Hill or the Great Northern Railway, after the making of the contract aforesaid, purchased from the State certain of the tidelands covered by it, and sought to excavate a *private waterway therein,* which would have worked a forfeiture of said contract required, by its terms, the filling in and raising said lands at least two feet above "the line of extreme high tide", See Exhibit 1. The defendant Hill disregarded said contract and its provisions and in said suit sought to have said contract cancelled and annulled

as such, among other grounds, because of the delay in its performance and failure of appellant to submit a new or different plan of bulkhead as required by both Commissioners Forrest and Bridges, and also sought to withdraw said lands from its operation, but the court held that the contract was in a state of suspension and was valid and binding, also *held* that the lands thus withdrawn by him were nevertheless all subject to the 15% profit as provided in said contract, bottomed upon the cost of filling, thus fixing a vested right in the lands so withdrawn, and said decision is *res judicata* and the Court below, in this case, was bound by said decision in the suit brought more than two years after the much touted "Bridges" letter.

The rights of appellant in and to the contract giving him the exclusive title to the earth contained in said waterway, for filling adjacent tidelands, has not been and cannot be successfully questioned. The *statute* enacted as aforesaid, to *vacate* said "waterway" and *vest* title thereto in the Port of Seattle, is the taking of appellant's property without Due Process of Law, and is void.

> See Taylor, Chapter XI., Sec. 216. Property Rights as Protected by Due Process —Vested Rights and Their Impairment.
>
> See also Taylor, Secs. 218-219-220.

But the Court below would escape the void legis-

lative Act, so vesting title on the grounds of "Laches" though no such defense was plead.

The relation of the State to appellant under the contract is a *continuing Trust* and the doctrine of *Laches* is inapplicable.

7 Encyc. of U. S. Sup. Ct., 813, N. 56.

The State of Washington is the dominant and beneficial party most interested in the performance of said contract. The work contemplated being the *principal part of the consideration for its sale of said tidelands* as aforesaid. The evidence of defendant's witness West (its engineer), See R. p. 111, shows the fill contemplated under the contract to be 7,000,000 cubic yards, (reclaiming from the ebb and flow of the tide about 300 acres) added value to said lands over and above the nominal money it had received for them: This added value for taxation purposes *for all time* to come,, costing the State *nothing;* but in the sale of said tide lands the state required and the purchaser of said tidelands *agreed* to pay it, as a *part of the purchase price thereof*, being at the rate of 16 cents per cubic yard and 15% thereon added, said per cent, as sole compensation to the contractor for filling the lands, amounting in all to approximately $1,300,000.00 long since actually due the State as the purchase price for said lands, so that the 15% profit due to appellant, under his contract when performed, is infinitesimal as compared to the interest of the

State, in the completion of said work of filling the said tide lands and in the excavation of the earth from said waterway, said waterway extending more than one mile in length and being 400 feet wide, such improvement in contemplation of law for the benefit of commerce and trade, to be enjoyed at that point of Seattle Harbor, for all time to come.

The future benefits to the city and the State are incalculable, all of which would have been lost to *both*, but for the energy and enterprise of this appellant.

How a Commissioner of Public Lands for the State of Washington, under his oath of office, could fail to discern the importance of this contract, and its literal performance, to the State,—I am unable to divine. Mr. Bridges, as disclosed by the record, has both in and out of office, been most vigilant in his endeavor to defeat these immense interests of the State, and more recently while he was one of the Commissioners of this defendant Port, in his deal with the Great Northern Railway Company, involving this identical waterway, by *vesting* title thereof in it, is left to conjecture. He was an active instrument in vesting title to one-half of said waterway in the Great Northern Railway, thus depriving the City of Seattle and the State of Washington for all time to come of its immeasureable value to commerce and trade, and at the same time placing it in the power of the Great Northern

Railway to exploit the Public through a monopoly of this vast, natural opportunity, for all time to come, for shipping and ocean commerce, at the most important part of Seattle Harbor.

It may be argued that in as much as the appellee has improved certain tide lands by the construction of expensive buildings thereon, it should therefore be permitted to block up said *waterway* and permit a railway company to appropriate the same for its own private use, in utter disregard of the rights of the State and the public weal.

We respectfully submit that such adjacent buildings are in contemplation of law and of said improvement, and this open waterway is a continuing benefit to any such improvement for the purposes of commerce and trade, but to permit, as is now the scheme of this appelee, to block up entirely practically the one-half of said waterway at its northerly end for the benefit of a railway company, would, in fact, if not wholly destroy the efficiency of said buildings and improvements, greatly impair their usefulness for the benefit of the Port of Seattle, and the State of Washington.

Respectfully submitted,

W. F. HAYS,
In Propria Persona.

FILED
OCT 14 1919
JAMES D. MAHER,
CLERK.

In the Supreme Court of the United States

OCTOBER TERM, 1918

No. [redacted]70

WILLIAM F. HAYS, *Appellant,*
vs.
PORT OF SEATTLE, et al., *Respondents.*

Brief of Respondent, Port of Seattle

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

HAROLD PRESTON and
O. B. THORGRIMSON,
Attorneys for Respondent,
Port of Seattle.

PRESTON, THORGRIMSON & TURNER,
Of Counsel.
Seattle, Washington.

In the Supreme Court of the United States

OCTOBER TERM, 1918

No. 389

WILLIAM F. HAYS, *Appellant*,
vs.
PORT OF SEATTLE, et al., *Respondents*.

Brief of Respondent, Port of Seattle

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

HAROLD PRESTON and
O. B. THORGRIMSON,
Attorneys for Respondent,
Port of Seattle.

PRESTON, THORGRIMSON & TURNER,
Of Counsel.

Seattle, Washington.

INDEX

	Page
MOTION TO DISMISS APPEAL	5
AFFIDAVIT IN SUPPORT OF MOTION	5 to 9
ARGUMENT AND AUTHORITIES ON MOTION TO DISMISS APPEAL	9 to 12
STATEMENT OF CASE ON MERITS	13 to 20
STATEMENT OF LAW POINTS	21 to 24
ARGUMENT ON ACT NOT IMPAIRING OBLIGATIONS OF CONTRACT	24 to 29
ARGUMENT THAT HAYS' CONTRACT WAS VOID	30 to 35
ARGUMENT ON POINT CONTRACT LAPSED	35 to 37
ARGUMENT ON POINT APPELLANT BREACHED CONTRACT	37 to 40
ARGUMENT ON LACHES	41 to 47
ARGUMENT ON POINT INJUNCTION SHOULD BE REFUSED BECAUSE OF DAMAGE TO RESPONDENT	48 to 51
ARGUMENT ON POINT CONTRACT WILL NOT BE SPECIFICALLY ENFORCED	52 to 54
ARGUMENT ON EFFECT OF DECISION IN HAYS vs. HILL	54 to 56

CASES

	Page
Kimball v. Kimball, 174 U. S. 158	11
Little v. Bowers, 134 U. S. 547	11
Washington Market Co. v. District of Columbia, 137 U. S. 62	12
Hice v. Orr, 16 Wash. 164	12
Barber Asphalt Paving Co. v. Hamilton, 80 Wash. 56	12
Hays v. Hill, 23 Wash. 730	23
Lord v. Thomas, 64 N. Y. 107	25
Brown v. Colorado, 106 U. S. 98	26
Caldwell v. Donaghey, 156 S. W. 839	28
Wright v. Railway Co., 176 U. S. 481	28
Young v. State, 19 Wash. 634	35
Whitesides v. U. S., 93 U. S. 247	35
Brown v. Buena Vista, 95 U. S. 157	42

Penn. Mut. Life Ins. Co. v. City of Austin, 168 U. S. 685 43
Keeling v. Pittsburg Railway Co., 54 Atl. 485 45
City of Logansport v. Uhl, 99 Ind. 531 46
Attorney General v. Railway Co., 27 New Jersey Equity 1 46
Haley v. Kilpatrick, 104 Fed. 647 47
Keener v. Baker, 93 Fed. 377 47
Lansdale v. Smith, 106 U. S. 391 47
Day v. Candee, 7 Fed. Cases, 230 50
McCarthy v. Bunker Hill Co., 164 Fed. 928 50
Kryptok Co. v. Stead Lens Co., 190 Fed. 767 51
Cubbins v. Mississippi River Commission, 204 Fed. 300 51
Ferry-Leary Land Co. v. Holt & Jeffery, 53 Wash. 584 51
Texas, etc., R. R. Co. v. City of Marshall, 136 U. S. 393 52
Pacific Electric Co. v. Campbell-Johnson, 94 Pac. 623 53
Broad v. Spokane, 59 Wash. 269 53
Hays v. Hill, 23 Wash. 730 54

IN THE SUPREME COURT OF THE UNITED STATES.

William F. Hays, Appellant,

vs.

Port of Seattle, et al., Respondents.

MOTION TO DISMISS APPEAL.

Comes now the above named respondent Port of Seattle and moves the court to dismiss this appeal for the reason that there is no longer any actual controversy involving any substantial rights between the parties to the record, and the right to the injunctive relief asked by appellant, if it ever existed, has now ceased to exist, and the question raised by appellant on his appeal is now only a moot question.

This motion is based upon the files and records in this cause and the affidavit of G. F. Nicholson attached hereto.

STATE OF WASHINGTON, }
County of King, } ss.

G. F. NICHOLSON, being first duly sworn, deposes and says:

That he is now, and has been for several years last past, the Chief Engineer of the defendant Port of Seattle, and,as such engineer, is thoroughly familiar with the Smith's Cove Water Way and adjacent

tide lands. That after the taking of this appeal by appellant, the United States, through its officials having charge of the matter, vacated the pierhead lines theretofore established by the United States on that portion of the Smith's Cove Water Way vacated by the act of the legislature of the State of Washington, which appellant is seeking to have declared void in this action, and re-established the pierhead line marking the inner boundary of said Water Way straight across said Water Way at a point immediately south of the southerly line of Garfield Street, all as more particularly shown on the blue print hereto attached marked "Exhibit A" and made a part hereof. That all of said Water Way so vacated by said act has heretofore been filled to an approximate level of six feet above city datum, and public streets have been laid out and improved across portions of said vacated Water Way, and a large portion of said vacated Water Way has been deeded to the Great Northern Company and is now and has been for some time past used by said railroad for its main transcontinental lines for tracks for its principal storage and switching yards, and other portions of said Water Way have been improved by tracks leading to the two Smith's Cove terminals shown by said blueprint to be situated on each side of that portion of the Smith's

Cove Water Way which was not vacated. That the portion of said Water Way south of Garfield Street has already been excavated to a mean depth of more than twenty-six feet below low tide (the depth to which the same was to be excavated in the contract with the State under which appellant claims) and the earth taken therefrom has been deposited upon the adjacent tidelands which were to be filled in under appellant's contract and upon the vacated portion of said Water Way. That sheet piling bulkheads, protected by rock rip-rap, have been constructed on each side of that portion of the Water Way so excavated, sustaining permanent solid fill piers on both sides of the Water Way, such fill and bulkhead constituting a permanent improvement. That the portion of the Smith's Cove Water Way vacated by said act of 1913 has been definitely abandoned by the State of Washington, the Port of Seattle, and the United States, as a waterway and the same has been permanently improved and is now being used for railroad tracks, yards, streets, and for storage facilities, for use in connection with the various port terminals situated at Smith's Cove. That the Port of Seattle has spent one million one hundred thousand dollars in filling in and improving the pier extending along the entire eastern side of said Smith's Cove

Water Way from Garfield Street south, and has already spent approximately the sum of one million two hundred and fifty thousand dollars in filling in and improving the pier on the west side of said Water Way from Garfield Street south to the outer harbor line, and has let contracts which are now under way in the construction of said west side pier which, when completed, will cost the sum of at least two million five hundred thousand dollars. That the dredging in said Smith's Cove Water Way from Garfield Street south required to be done under said State contract with appellant has been completed since this appeal was taken and that portion of the former Water Way from the southerly line of Garfield Street extending northward has been permanently abandoned as a Water Way, and there is no portion of said Water Way as it existed at the date of appellant's contract with the State which could now be excavated without destroying the valuable tracks and terminal yards of the railroad companies and the Port of Seattle, cut off the railroad communication with the piers which is absolutely essential for their use, and otherwise seriously impair the use of the docks and piers belonging to the Port of Seattle located at Smith's Cove, and destroy the entire plan of improvement which has been adopted and carried

out at said point by the railroad companies, the City of Seattle and the respondent Port of Seattle, with the consent and approval of the State and United States authorities.

G.F. NICHOLSON.

Subscribed and sworn to before me this 2nd day of October, 1919.

F. E. SANSOM,

Notary Public in and for the State of Washington, residing at Seattle.

ARGUMENT AND AUTHORITIES ON MOTION TO DISMISS APPEAL.

As is shown by testimony of Robert Bridges (Record 86-90) and J. E. Shoemaker (Record 128-129), the portion of Smith's Cove Water Way south of Garfield Street had been at the date of trial in the court below partially dredged and the earth deposited upon the abutting tide lands to the eastward and in making a partial fill upon that portion of the Water Way north of Garfield Street, and the tide lands east of the Smith's Cove Pier "A" excavated for a channel, and since said time, as is shown by the affidavit of G. F. Nicholson herein set forth, all of said Water Way south of Garfield

Street has now been excavated to a mean depth in excess of twenty-six feet below low tide (the contract depth), permanent bulkheads have been placed on each side of said Water Way, sustaining solid fill piers, and all that portion of the Water Way which has been vacated has been filled and is now being used for city streets, railroad tracks and yards, and storage and warehouse and other terminal facilities used in connection with the Smith's Cove piers belonging to the Port of Seattle, all in accordance with plans adopted and carried out by the municipal bodies and public service companies interested, with the consent and approval of the United States. It will thus be seen that even though appellant's contract with the State should be held to be in force at this time, there is nothing remaining for him to do in the way of excavating any portion of the Water Way from Garfield Street south or in the construction of permanent bulkheads sustaining the tide land fills on each side of said waterway, because such work is nowcompleted, and any attempt to now excavate that portion of the former waterway located north of Garfield Street would immediately affect the public streets located upon such vacated waterway and the use by the Great Northern Railroad Company and other companies interested of

the tracks and terminal facilities now located on the vacated portion of the waterway, and certainly appellant would not be given the right to excavate such portion of the vacated waterway as against said city of Seattle and the railroad companies interested without first having their rights adjudicated in a proper proceeding. It therefore follows that the injunctive relief sought by appellant would avail him nothing at this time and that his only remedy, if any he has, is one for damages against the proper parties, and in this action the only relief sought being injunctive relief, the question raised by appellant is now a moot one and will not be considered by this court.

In the case of *Kimball vs. Kimball,* 174 U. S. 158 (19 Sup. Ct. Rep. 639), this court held that it was limited in its jurisdiction to cases involving actual controversies and in which its judgment would be effective, and that if by reason of events subsequent to the rendition of the judgment sought to be reversed, the particular relief sought could not be afforded, a writ of error would be dismissed.

In the case of *Little vs. Bowers,* 134 U. S. 547, (10 Sup. Ct. Rep. 620), a motion to dismiss, supported by affidavits showing that there was no act-

ual controversy left between the parties, was sustained, even though the moving party was negligent in not promptly calling the attention of the court to the fact of the cessation of the controversy, the court holding that the proper administration of justice demanded that the fact that there was no controversy might be shown at any time before the decision of the case.

This court has further held that a case will not be retained merely to determine the disposition of costs.

Washington Market Co. vs. District of Columbia, 137 U. S. 62 (11 Sup. Ct. Rep. 4).

"The fact that there is no controversy between the parties to an action, or that a right involved in an action has ceased to exist, may be shown at any time before the case is decided. *Little vs. Bowers,* 134 U. S. 547 (10 Sup. Ct. 620). And such fact may be shown either by the record or by evidence outside of it. 2 Enc. Pl. & Pr., p. 344. See also *Washington Market Co. vs. District of Columbia,* 137 U. S. 62 (11 Sup. Ct. 4)."

Hice vs. Orr, 16 Wash. 164.

See also Barber Asphalt Paving Co. vs. Hamilton, 80 Wash. 56.

STATEMENT OF THE CASE ON THE MERITS.

As we have not yet received a copy of appellant's brief, we do not know how full or accurate a statement of the facts will be made by him, and in order to more easily understand the various propositions advanced by respondent supporting the lower court, we will make a brief statement of the facts as we gather them from the record. In this connection, respondent is somewhat handicapped for the reason that none of the exhibits have been included in the printed record—a fact which respondent did not ascertain until a short time ago—and such exhibits being now on file in Washington, are not available for use in preparing this brief.

Under the Session Laws of Washington, 1889-90, p. 731, our legislature provided for the establishment of certain waterways across the tide lands in front of any incorporated city and authorized the board of harbor line commissioners in the platting of such tide lands to lay out such waterways. In accordance with such act, aided by subsequent legislation giving them authority, the harbor line commissioners included in their plat of the tide lands lying in front of the city of Seattle a certain water-

way known as Smith's Cove Waterway, extending from the outer harbor line of what is known as Smith's Cove northward a distance of approximately one mile. In 1893, the legislature of this State (Session Laws of 1893, p. 241) authorized the commissioner of public lands of the State to let contracts for the excavation of waterways and the filling in of tide lands belonging to the State adjacent to such waterways, such act further providing that any such contract should not become binding until approved by the Governor and a bond filed with the commissioner.

The appellant Hays and one Frank Shay applied to the land commissioner for a contract for the excavation of Smith's Cove Waterway and the filling in of the adjacent tide lands, and notice of such application was given as required by the act. On July 25, 1895, Shay assigned to Hays all his interest in said application. (See Ex. "L".) The original portion of the contract was executed by the land commissioner and Hays, on August 3, 1895, and Hays also at that time signed the name of Shay to the contract. The contract was thereafter modified by adding a provision for the excavation of certain uplands between the Smith's Cove Waterway and Salmon Bay and so modified was executed by the

parties on February 26th, 1896, Hays again signing Shay's name to the modification, and on March 7th, 1896, the contract as modified was approved by the Governor. The original draft of the contract provided for work to be commenced within six months from date of approval and finished within six years, and the modification required the work to be commenced within two months of approval and to be completed within two years. It is shown by the testimony of Hays that the Governor approved the contract only on account of the modification (Record 31-43). The contract specified certain kinds of bulkheads but contained the further provision that the commissioner of public lands should have power to modify the plans and specifications of the bulkheads as to shape, form, character and material. Hays claims that through a sub-contractor he commenced driving piles for the bulkhead on May 4, 1896 (Record 38-49), in which he is corroborated by his engineer, Hamlin (Record 68). Hays further claims that on the same day, i. e., May 4th, he was notified by the land commissioner or his engineer to quit work on account of proposed changes in the bulkhead, and there is no question that no work of any kind under said contract was thereafter done by Hays or anyone on his behalf, or that he made any

attempt to do any further work, his subsequent efforts being confined to letter writing and talks with some of the State authorities. It is admitted by Hays that the reason given for the stoppage of the work was that the state commissioner was requiring some kind of a stone bulkhead instead of the brush bulkhead outlined in the plans and specifications prepared by Hays' engineer, Hamlin (Record 42, 67), and Hays at all times seems to admit that it was within the power of the land commissioner to change the character of the bulkhead, merely claiming that the cost of the stone bulkhead would be so great as to amount to confiscation (Record 84, Ex. "G"). Negotiations were thereafter had by Hays with Forest, the land commissioner in office at the time of the entry into of the contract, and with his successor, Bridges, with reference to the character of the bulkhead, and both of these commissioners, as well as their successor, Calvert, and the two State Engineers then in office, at all times insisted that the brush bulkhead would not do and that some kind of stone bulkhead would be necessary. That this was a reasonable requirement is shown by the evidence of the various engineers who testified at the hearing in the lower court. (Gillis, Record 78; Cryderman, 81; Adams, 100; West 104.) Hays admitted that he

told Forest that the requirements of the stone bulkhead was in violation of the contract and that he would refuse to put in stone unless required by the court (Record 40, 41). There was no change on the part of the State authorities of their decision that brush bulkheads would not do and that some kind of stone bulkhead would have to be put in, and Commissioner Bridges testified (Record 84) that November 1897 was the last time that any question of bulkhead was raised by Hays, although in a subsequent letter to Commissioner Calvert reference was made to the bulkhead.

Hays thereafter raised the question that he should be furnished a right of way over the uplands to Salmon Bay before starting his contract (Record 46, 47), and admitted at the trial that he took the position that he had to have such right of way before he could proceed. As is shown by the letter of the land commissioner, the state refused to furnish such right of way, and then Hays raised the question that the tide lands should be appraised before he could go ahead with the work, admitting that he felt doubtful whether or not his liens might not be attacked if the same were not done. It is shown by the record that the United States Government plans for a canal from Salmon Bay to Smith's Cove, which

would cover the uplands in question, which Hays was expecting to excavate under the modification of the contract, were definitely abandoned by the Government (Record 42), the Shilshole Bay route having been adopted in 1898 (Record 86). In 1899 Hays brought an action against James J. Hill and the railroad company to enjoin them from interfering with appellant under his contract and for damages, a copy of the complaint in this case being in the record herein as Exhibit "O". As shown by the record, nothing further seems to have been done by Hays in any manner whatsoever under this contract from the latter part of 1903 until several days before the bringing of this action in November, 1914, when a notice was served upon the land commissioner protesting against the vacation of the waterway (see Ex.....). In the meantime, the legislature of the State of Washington (Session Laws of 1913, p. 195) had vacated that portion of the Smith's Cove Waterway north of the southerly line of Garfield Street, it not ever having been improved, and provided that the title to the same should vest in the Port of Seattle upon its procuring consent of all of the owners of abutting property, such consent being thereafter secured (Record 112).

The Port, in June 1913, commenced the con-

struction of a bulkhead to protect its pier which it was then building on the east side of that portion of the waterway which had not been vacated, and in September 1913 commenced the excavation of the waterway (Record 107), using the earth therefrom for filling in the pier and that portion of the waterway which had been vacated, and the Port also constructed a waterway on the east side of such pier through the tide lands, the situation thus being that the Port pier—which was some 2500 feet in length—had a frontage on the west of the Smith's Cove waterway and on the east by a waterway constructed by the Port through its own tide lands, which were a portion of those which Hays was to fill from his excavation of the waterway. It is further shown that no notice of any kind was given to the Port that Hays claimed that the Port did not have a right to go ahead with the excavation of the waterway and the improvement of the adjacent tide lands until just before the bringing of this action in November 1914, and the facts, as shown in the record, are that prior to the hearing of said action the Port had spent approximately $900,000 (Record 92), building its pier along the east side of the waterway and in excavating said waterway, and that the major portion of the waterway north of Garfield Street (being that

portion which was vacated by the act of the legislature in question) had been filled to an elevation of five feet about city datum.

It is further shown by the testimony of Commissioner Bridges that no waterway north of Garfield Street was justified by conditions existing at the time of the trial (Record 87), and that if Hays' contract was in force, the Port piers would be cut off from railroad communication and the use of the same destroyed (Record 93 and 117).

This action was brought to enjoin the Port and other defendants from asserting any rights claimed under the act of 1913 vacating the north half of Smith's Cove waterway and from interfering with Hays' rights under his contract with the State.

In the original action the attorney general and the railroad company were made parties, but a dismissal was had on appellant's motion as to the attorney general shortly after the case was brought and on the trial at the close of appellant's case, it was dismissed as to the railroad company, with appellant's consent (Record 73). Judgment was thereafter rendered in favor of the respondent Port of Seattle, and from such judgment this appeal is taken.

ARGUMENTS AND AUTHORITIES ON THE MERITS.

We believe the judgment of the lower court is right, and that it should be affirmed for the following reasons:

1. The act of the legislature of the State of Washington vacating that portion of Smith's Cove Waterway north of Garfield Street does not in any manner impair the obligation of the contract, if such exists, which Hays has with the State of Washington.

2. The contract under which Hays claimed was void ab initio, because:

(*a*) It was never properly executed;

(*b*) It provided for the excavation of a waterway over private lands.

(*c*) Because it did not specify definitely the character of the bulkheads to be built.

3. The contract lapsed, because:

(*a*) It was not commenced within the time limited by law.

(*b*) It was not finished within the two-year period expressed in the contract.

4. Appellant himself breached the contract:

(*a*) By refusing to carry out the request of the various land commissioners that he build a stone bulkhead.

(*b*) By refusing to carry out the contract unless he was furnished a right of way over the private lands extending from the Smith's Cove Waterway to Salmon Bay.

(*c*) By refusing to proceed with the contract unless the tide lands to be filled in were appraised.

(*d*) By failure to proceed with the work at all.

5. Appellant has lost all rights by laches:

(*a*) By his non-action and delay for more than eighteen years, he will be considered to have abandoned the contract and to have lost all rights thereunder.

(*b*) By his failure to take any steps under or by virtue of said contract between June 1913, the date the vacation act was effective, and the time of bringing this action, in November 1914, during which period the Port spent approximately $800,000 on the work.

6. That appellant is not entitled to the relief

sought for the reason that the injury done by the granting of an injunction would be much greater than the harm done appellant by refusal to grant the same, this principle applying especially where public interests are involved.

7. That the contract in question is not of such a character that a court of equity would specifically enforce, the only remedy appellant having being an action for damages.

8. That under the doctrine of *Hays v. Hill,* 23 Wash. 730, involving appellant's rights under the contract in question, he is not entitled to injunctive relief against respondent.

In this case we have on one side a man who, to speak the very best for his case, has but a doubtful contract, under which practically nothing has been done, though it has existed since March 1896. On the other side, we have a municipal corporation formed for the purpose of developing one of the principal assets of this community, viz.: its harbor, and which had at the time of the bringing of this action expended approximately $800,000 on and adjacent to this waterway, thereby changing its character so that it could not now be excavated and the adjacent tide lands filled as provided in appellant's

contract without practically destroying respondent's port improvements and entirely changing the development and improvement which now has taken place at this point. Certainly, the granting of an injunction as prayed for by appellant would not aid him in the slightest degree in coming to an agreement with the State of Washington, as to character of bulkheads and other matters in dispute between them or enable him to proceed under his contract, and the result of such injunction, therefore, would be to destroy the public use now being made of this property without assisting appellant in the slightest degree.

We will take up and consider in their order the various points heretofore set forth:

THE ACT OF 1913 DOES NOT IMPAIR THE OBLIGATION OF APPELLANT'S CONTRACT.

Granted that appellant had an existing contract enforceable as against the State in the year 1913, it seems to us clear that the passage of the act vacating that portion of Smith's Cove Waterway lying north of Garfield Street did not in any wise affect the obligation of such contract. It does not refer to Hays'

contract or attempt in any way to impair its obligation.

Hays in 1913 had a contract which for many years, as he claims, the State has not allowed him to carry out. There is no showing or claim that if the Port had not gone in and made the improvement, which it did, of the waterway and adjacent property, he (Hays) would have been able to have gone ahead with his contract. In an ordinary contract a party ordinarily has two remedies: (1) For specific performance; (2) Where a contract is breached, to recover damages for such breach, including payment for work done and prospective profits. In this case, as we expect to hereafter show, the only remedy Hays had was for damages, Section 886 Remington's Code providing:

> "Any person or corporation having any claim against the state of Washington shall have the right to begin an action against the state in the superior court of Thurston county."

We desire to call the court's attention to several cases bearing upon the proposition that the result of the State vacating the waterway merely constituted a breach of contract and did not impair its obligation. A leading case on that subject is that of *Lord vs. Thomas,* 64 N. Y. 107. In that case the State of New

York passed a law creating a commission authorized to enter into contracts for a state reformatory. The commissioners entered into such a contract with plaintiff upon approved plans. The building was partially constructed when the legislature concluded to curtail the cost thereof, and an act was passed creating a new commission to enter into a new contract for the completion of the reformatory on a less comprehensive scale. The contractor brought suit to restrain the commissioners from proceeding under the new contract, and set up the claim that the subsequent legislation impaired the obligation of his contract and therefore was unconstitutional. The court held that a state in making business contracts had the same right to stop work under such a contract as private individuals, and that the stopping of work by the legislature no more impaired the obligation of the contract than would the stopping of work by private individuals. The court further held that such refusal to allow the parties to go ahead with work under the contract was a violation of the same, but did not impair its obligation, as the injured party would have a just claim against the State for any damages sustained by him from such breach.

In the case of *Brown v. Colorado,* 106 U. S. 98,

the plaintiff in error had conveyed to the Territory of Colorado certain lands with the covenant that a capitol building should be erected on the same. The claim was made that the State had impaired the obligation of this covenant on account of the adoption of certain statute and constitutional provisions. The court in discussing this proposition says:

> "The claim is, that the Territory of Colorado contracted with Brown to erect a capitol and other public buildings on the premises conveyed; but, if that were so, the Constitution of the State and the statutes relied on did not impair the obligation of such a contract. The most that can be said of them is, that in this way the contract was violated by the State. The question is not, whether the constitutional provisions and the statutes in question are valid, but whether, by the adoption of the Constitution by the people, and the passage of the statutes by the legislature, any condition attached to the conveyance has been broken which authorized him to revoke his deed and take possession of the property he conveyed. The decision of this question by the State court is not reviewable here. All the obligations of the original contract remain, and the State has not attempted to impair them. If the contract is all that he claims it to be, and the Constitution and statutes are just what he says they are, the most that can be contended for is that the State has refused to do what the Territory agreed should be done. This may violate the contract, but it does not in any way impair its obligation. If we should declare the constitutional provisions

and the statutes invalid as against the contract, it would not change the rights of the parties to this action."

The case of *Caldwell v. Donaghey,* 156 S. W. 839, which follows the doctrine of the foregoing cases, also holds that a contract for the construction of a capitol building will not be specifically enforced in equity.

The case of *Wright v. Railway Company,* 176 U. S. 481 (20 Sup. Ct. Rep. 398) seems to be squarely in point. That was an action brought to enjoin a railroad company from taking possession of a certain canal right of way and constructing a railroad thereon. The plaintiff was the owner of a certain tract of land through which the canal passed and also owned a mill located on such land which was operated by water power supplied by the canal. Further, his grantor, one Worthington, had a contract with the state under which a dam was to be forever maintained across the Hocking River in order to afford an ample supply of water, and in return the state was given the right to construct the canal through the land in question. As appears from the statement of facts set forth in the opinion in the state court (see 58 Ohio State 123), the state authorized the vacation of such canal and the use of

the same by the railroad company as a railroad right of way. The court held that plaintiff had no cause of action, saying:

> "* * * that, so far as related to the contract between Worthington and the state, his remedy would be in damages for breach of the contract, and not an injunction against the company entering upon the lands purchased from the state in which he had no interest."

In the case at bar, the same as in the case cited, a waterway in connection with which contract rights were acquired, was vacated by the state. That case was brought against the railroad company, attempting to take possession of the waterway as here it is brought against the Port of Seattle. Certainly the Port stands in as favorable a position here as the railroad company did in that case.

There can be no question that the state had the right to vacate the waterway in question. It will be noted that this waterway was laid out by virtue of an act of the legislature over lands owned by the state. The state certainly had the right to thereafter by another statute vacate such lands, it still being the owner of the same, and this is especially true where such vacation is had with the consent of the abutting land owners, as is the case here.

THE CONTRACT UNDER WHICH HAYS CLAIMED WAS VOID AB INITIO.

It was never properly executed by the parties to whom awarded. The law of 1893 under which this contract was made provided for an application being made for a contract, publication of notice, and a hearing had giving opportunity to persons to object thereto. Prior to the signing of the contract, as it shown by the record, Shay, on July 25, 1895, had assigned all his right, title and interest in the application to Hays, Hays himself admitting that Shay had no beneficial interest in the contract after such assignment (Record 119). Despite that fact, the contract was entered into with both Hays and Shay, Hays simply signing Shay's name to the contract. It is clear that Frank Shay, never having signed the agreement, was never bound by it, and it follows as a matter of course that if the contract had to be executed by Shay, neither the state nor the bondsmen would be bound; in other words, the contract was never executed by the parties to whom the contract had been awarded, and we must assume that the only reason Hays signed Shay's name to the contract was because he realized that under the law a new application by other parties than those to

whom the state awarded the contract would have to be made and new notice published and hearing had thereon.

There is another reason why the contract was void. Under the law of 1893, Session Laws of Washington, page 242, it is provided:

> "That when harbor lines and waterways have been established by the harbor line commission of the state, no other waterways shall be excavated except the waterways exhibited on the final maps of said harbor line commission, except with the consent and approval of such harbor line commission."

In this case, as shown by the maps in evidence, no waterway was established between Salmon Bay and the north end of the Smith's Cove waterway.

The contract as finally executed contained a provision that Hays and Shay should, at their own cost, excavate a waterway from the north end of Smith's Cove waterway to Salmon Bay. As is shown by the recitals of the contract (Ex. 1), the inclusion of this provision was the impelling reason for the approval of the contract by the Governor. Hays admits this (Record 43). This additional excavation, therefore, became an integral part of the contract. That to include it was clearly beyond the authority

of the Governor and land commissioner is apparent. There is no claim that it was ever approved by the harbor line commission, and therefore it comes within the prohibition of the statute heretofore quoted. Under the act of 1893, upon which the contract in question is based, the state could not contract to excavate lands which it did not own, nor could it contract to excavate anything but a waterway across state tide lands. It certainly could not contract to excavate a government canal and impose a lien upon the property owners adjacent to a waterway in the vicinity of that canal for the cost of the earth taken from such canal. It being shown from the recitals in this contract that it was detrimental to the interests of the state to enter into this contract,

"Except on the express terms and conditions *as the principal consideration* that said contractors would undertake, at their own cost and free of cost to the United States of America, the State of Washington, the County of King and the City of Seattle, to excavate the waterway extending from the north end of said waterway, and across the peninsula separating Smith's Cove from Salmon Bay, such excavation to be under the direction and in accordance with the plans of an engineer to be designated by the state or the United States, said waterway when

excavated to be owned, possessed and controlled by the United States of America, or by said State, free of cost to the said state or United States whenever said state or United States shall demand possession of the same." (See Ex. 1.)

Therefore, the principal consideration for the same was not the excavation of the Smith's Cove waterway, but the excavation of the government canal over private lands. It follows that the state having no authority to insert such a provision in the contract, the whole contract is therefore void.

A third reason why this contract is void is that it did not comply with the plain provisions of the statute specifying the character of bulkheads, section 7 of the laws of 1893, p. 245, providing:

> "All contracts provided for herein shall specify the character of all bulkheads and other restraining works and be accompanied by drawings and specifications of the same, and the commissioner of public lands shall be the judge of the sufficiency thereof, and of the minimum depth to which any waterway shall be excavated, in order to make the same useful for the purposes of commerce and navigation."

The statute in question provided for the filling of lands which the state expected to sell, and it was important that the law should contain safeguards for

the protection of such third parties. Therefore, it was proper that the character of the bulkhead should be specified in the contract. The contract did attempt to specify the kind of bulkheads, but also contained the following clause:

> "Provided, however, that the Commissioner of Public Lands shall have full power and authority to modify said plans and specifications of bulkheads and restraining walls, as to the shape, form and character of material as may be shown by experiment or otherwise to be necessary to impound in a secure manner, the material of the embankment provided for therein."

From the insertion of the foregoing clause ,it is clear that an intending purchaser could not in any wise decide what kind of bulkhead would finally be placed, and therefore would not know what the cost of the same would be. Even after the state sold the tide lands, such sales being subject to such contract, an innocent purchaser might find a much greater cost imposed upon him than he had any right to expect. As we understand the matter, Hays admits that as between himself and the state this clause was binding, an admission he is practically forced to make because if he claimed it was invalid then it was his duty to have gone ahead with the contract, put-

ting in the bulkhead set forth in the plans referred to therein.

In deciding whether the state officials had the power to enter into this contract with the provision in regard to the excavation of the government canal and the indefinite provision as to bulkheads, we should bear in mind that they only had such power as has actually been conferred upon them by statute and that the state would not be bound by the unauthorized acts of its officers or agents.

See *Young v. State,* 19 Wash. 634.

The case of *Whitesides v. United States,* 93 U. S. 247, sets forth, at page 256 of the opinion, the different rules governing the acts of public and private agents, it holding that individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity.

THE CONTRACT LAPSED BECAUSE NOT COMMENCED AND FINISHED WITHIN THE TIME PROVIDED.

In accordance with the law of 1893, the contract specifically provided a time of commencement and a time of completion. We believe it is clear from the

evidence that Hays never in good faith commenced work under the contract. It is true that he testified that several piles were driven on May 4th, a day or two before the time of commencement expired. Hays claimed that he received a telegram on that day to stop, but Forest, the then land commissioner, stated that he did not think that he had sent such telegram (Record 96). But granted that he did do several hours work on that day, it is clear that what the contract provided for was a commencement by doing some substantial work. The evidence of State Engineer Gillis, who made an examination of the ground in June and July, 1896, within a month or two after Hays claims he started work, shows that he then saw no evidence on the ground of any work having been done (Record 79).

But even assuming that Hays did work two or three hours on May 4th and was then stopped, the contract by its terms had to be completed on or before March 7, 1898, unless an extension of time was granted, which, under the law, the commissioner had a right to give upon the showing of due diligence. There is no claim that an application for extension was ever made or that such extension was granted. Twenty-three years have elapsed since the entry into of this contract and nothing has been done there-

under. Some claim may be made that on account of certain of the commissioners treating with Hays in respect to the change of bulkhead it amounted to an implied extension; but there can be no such thing as an implied extension, for the reason that the contract had a specific date when it must be completed, and the law expressly provided the manner in which time might be extended. In any event, many years have elapsed since any act was taken by any land commissioner or other official of the state which appellant could claim in any wise would be considered as an extension.

It should also be borne in mind that the respondent port of Seattle took title to the vacated waterway fifteen years after the expiration of the time limited in the contract for its completion, and it certainly could not be bound by any extension by legal implication.

APPELLANT HIMSELF BREACHED THE CONTRACT.

The evidence shows that the state authorities, after investigation, determined that a brush and pile bulkhead would not be sufficient and that some kind of a stone bulkhead would be required. That

this requirement is reasonable is shown by the evidence of the engineers who testified in the case that the bulkhead would have to be protected by stone or rock rip-rap, and that the brush bulkhead would not be sufficient. Hays knew as early as May 12, 1896 (see Defendants' Ex. A), that a change would have to be made in the bulkhead plans. Instead of doing this, Hays attempted to secure the consent of the commissioner to go ahead with the brush bulkhead, but the land commissioner refused to accede to Hays' wishes. The next commissioner, Bridges, notified Hays that the plans were insufficient and impracticable and he was notified to submit plans and specifications for a stone wall, excepting for the interior waterway, the letter further providing:

> "Within thirty days from this date you are hereby notified to submit plans, specifications and estimates according to the above instruction and commence operations within ten days after the approval of said plans, specifications and estimates by this department or show good cause why an action should not be taken by the state for the annulment of said contract."

In response to this letter (Defendants' Ex. G), Hays refused in effect to submit such plans. No claim was ever made by Hays until this trial that it was the duty of the land commissioner to prepare plans and specification, and as the evidence of the

state engineers, Cryderman and Gillis, show, no plans of this kind were ever prepared in the Land Commissioner's office, but were prepared by the contractor (Record 80, 96-97). The stone bulkhead being therefore a necessary requirement, there was only one thing for Hays to do: that was, either to comply with the requirements of the Land Commissioner and build the bulkhead, or refuse to carry out the contract. In effect, he chose the latter alternative. That he was of the same opinion in regard to this bulkhead at the time of the trial as he appeared to have been in 1898 is apparent from his testimony, where he says that he surely would have refused to put in such a bulkhead unless required to do so by the decree of the court (Record 41).

After Commissioner Bridges had issued his ultimatum regarding the bulkhead, Hays began to shift his ground, and then raised for the first time the point that he had not been provided with a right of way over the proposed route of the north canal (Defendants' Ex. H). And in his later correspondence with Bridges' successor, Calvert, the point he is insisting upon is the obtaining of this right of way. It is apparent from the contract itself (granting that it is valid) that Hays had no right to require the state to furnish this right of way, and it seems

to us that the only reason for his insisting upon it was to excuse his failure to go ahead under the contract.

Later, Hays again shifted his ground and insisted that the Commissioner appraise the tide lands, which was refused. Hays then brought suit against the Commissioner to require such appraisement, the court refusing Hays' application. After this nothing further seems to have been done by Hays until November 12, 1914, several days before this suit was started, when Hays filed with the then land commissioner a protest against the vacation of the waterway. It seems to us apparent that Hays really did not intend to perform this contract and when he could not keep up the issue of the bulkhead he raised the issue of the right of way over the north canal route and when he could not keep up this issue any longer, he raised the issue of the appraisement of the tide lands. This is confirmed by the fact that he raised the issue of the north canal route and insisted on that issue long after the United States Government had adopted a different route. It was the fault therefore of Hays and not of the state officials that this contract was not carried out.

APPELLANT HAS LOST HIS RIGHTS UNDER SUCH CONTRACT THROUGH LACHES.

In our opinion, the statute of limitations began to run against this contract at the expiration of the two-year period for the completion of the same. The statute of this state applicable to written contracts of this kind is six years; and while we appreciate that this court might not be bound to consider the six-year period of limitation as binding, yet it will apply it by analogy. For eighteen years appellant did nothing under this contract; and although he asserts that he was stopped in May, 1896, from prosecuting the work, he has given no reason why he did not in some manner attempt to have his rights under the contract settled long ago. From the time of the letting of this contract until the bringing of this action, conditions at Smith's Cove had radically changed. The Great Northern Railway alone had expended at least a million dollars on improvements adjacent to this waterway (Record 99). The Port of Seattle had taken possession of the vacated waterway, filled it, excavated the larger portion of the waterway south of Garfield Street, and had erected an enormous overseas pier, expending some $800,000 thereon, presumably on the faith that all rights that

Hays might have under his contract to excavate said waterway and fill the abutting lands had been abandoned or lost. Certainly, the progress and development of this important portion of the city should not be made to wait upon Hays some time in the indefinite future asserting his rights under such contract.

This court in the case of *Brown v. Buena Vista,* 95 U. S. 157, holds that a court of equity applies the rule of laches according to its own ideas of right and justice, and quotes in its opinion the following:

> "Nothing can call forth"—a court of equity —"into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction there was always a limitations of suits in this court." *Smith v. Clay,* Amb. 645.

The rule governing this proposition is laid down in 16 Ency. of Law, p. 356, as follows:

> Relief by injunction is not controlled by arbitrary or technical rules, but the application for its exercise is addressed to the conscience and sound discretion of the court. Where a party seeks the intervention of a court of equity to protect his rights by injunction, the application must be seasonably made, or the rights may be lost, at least so far as equitable intervention

is concerned. It is a rule practically without exception that a court of equity will not grant relief by injunction where the party seeking it, being cognizant of his rights, does not take those steps to assert them which are open to him, but lies by and suffers his adversary to incur expenses and enter into burdensome engagements which would render the granting of an injunction against the completion of his undertaking, or the use thereof when completed, a great injury to him. A suitor who by laches had made it impossible for a court to enjoin his adversary without inflicting great injury upon him will be left to pursue his ordinary legal remedy. This rule is especially applicable where the object of the injunction is to restrain the completion or use of public works, and where the granting of the injunction will operate injuriously to the public as well as to the party against whom the injunction is sought. A party who by his laches has made it impossible to prevent the completion or use of public works without great injury or inconvenience to the public will be confined to the relief obtainable by ordinary means in a court of law."

In connection with this doctrine we wish to call the attention of the court to the case of *Penn. Mut. Life Inc. Co. v. the City of Austin,* 168 U. S. 685. That was a suit brought by the bondholders of a private waterworks company to enjoin the City of Austin from building a municipal waterworks. The complaint alleged a pre-existing contract with the City of Austin for the furnishing by a private com-

pany of water to the city for a period of years and futher alleged that the ordinance providing for the municipal waterworks impaired the obligation of this contract; that the bondholders had loaned large sums of money upon the faith of this contract. The argument was made in that case that the ordinance establishing the municipal waterworks took complainant's property without due process of law and destroyed the property in the contract of the water company with the city of Austin. There had been a delay of five years in bringing suit and the Supreme Court of the United States, after conceding in the opinion that it might be the ordinance impaired the obligation of the contract and destroyed the property in the contract, held there was such laches on the part of the complainant as to bar relief.

Hays certainly must be presumed to have known of the passage of the act vacating a portion of Smith's Cove waterway which was passed in March, 1913, and became effective in June 1913, and that the Port was proceeding to build its extensive terminals relying upon such vacation being valid. Yet he did not bring this suit asking for injunctive relief until seventeen months after the act had become effective.

In the case of *Keeling v. Pittsburg Railway Co.*, 54 Atl. 485, an ordinance authorized a contract with the railroad company to elevate its track, such contract being entered into April 13, 1901. The abutting owners, on June 22, 1901, filed a bill to restrain the completion of such contract. The court held that, the railroad company having expended large sums of money in the construction of the improvement and purchased realty on the faith of the contract, that complainants were guilty of laches, even though only two months had elapsed, the court holding:

> "In view of all this work and expenditure of money before the eyes of all the complaining lot holders, no steps were taken to assert their alleged rights. The conclusion of the court below is: 'The delay of the interveners, the magnitude of the work done, and the great expense already involved, in the proposed avoiding of grade crossings by defendants' road, when contrasted with any injury which can possibly arise to plaintiffs, are considerations which will prevent a court of equity from granting an injunction, even if it was clear the plaintiffs have a strict legal right. * * * An injunction is of grace, and not of right, and a chancellor is not bound to make a decree which will do far more mischief and work far greater injury than the wrong he is asked to redress.' *Chartiers Block Coal Co. v. Mellon,* 152 Pa. 286, 25 Atl. 597, 18 L. R. A. 702, 34 Am. St. Rep. 645. And very slight delay on the part of the complainant in invoking equitable relief, when the work is of

magnitude and public interests are prejudiced, will be sufficient to stay the hand of a chancellor. Kerr on Injunctions, p. 19."

In the case of *City of Logansport v. Uhl,* 99 Ind. 531, the court held (quoting syllabi):

"Where the owner of a water power stands by, and, not objecting, permits a city, without first assessing and paying his damages, to erect works for a water supply by drawing water from the stream and thus diminishing his power, he creates an equitable estoppel, so that he will not be protected by injunction, but will be left to assert his rights at law."

In the case of *Attorney General v. Railway Co.,* 27 New Jersey Equity 1, the court held that where a party acting bona fide and on its not unreasonable construction of a public grant, has been permitted to expend large sums of money in the construction of a public work in the belief that it possesses all requisite legislative authority, without a word of protest or remonstrance until the work is practically completed, equity will refuse injunctive relief even to the state, leaving it to its remedy at law.

But appellant may claim that the plea of laches is one which must be raised affirmatively and respondent is not now in position to avail itself of it. As to this point, it should be borne in mind that the facts as to the delay came out in plaintiff's own case,

and the facts as to the work done by the respondent were brought out both by appellant himself in his case in chief and by the respondent without any objection that it was not within the issues pleaded. Even if it should be conceded that the respondent should have pleaded laches, the general rule is that where the evidence supports the verdict or judgment the pleadings will be considered amended to conform to the proof.

See *Haley v. Kilpatrick,* 104 Fed. 647.
Keener v. Baker, 93 Fed. 377.
Lansdale v. Smith, 106 U. S. 391.

It should be borne in mind that in this case the laches appeared in the making out of appellant's case, and certainly a court of equity in determining whether appellant was entitled to injunctive relief had a right to consider the laches which appellant himself had shown.

A COURT OF EQUITY WILL REFUSE TO GRANT AN INJUNCTION WHERE THE DAMAGE DONE BY SUCH GRANT IS GREATER THAN THE RELIEF ASKED FOR WARRANTS.

We presume that in this case appellant will claim such relief as will enable him to proceed with his contract and excavate the entire Smith's Cove waterway and fill the adjacent tide lands and secure liens upon them for the making of such fill. If he is held entitled to such relief, the benefit to him in the way of prospective profits, to say the most, is very speculative, because of the changed conditions and higher prices of both labor and materials. It should be borne in mind that the contract limited the entire cost, including bulkheads, to sixteen cents per cubic yard, and there certainly is no testimony in this case that such work could be done at this time for such sum, the only testimony in regard to cost in the case being that of the former port engineer, Whitham (appellant's own witness), to the effect that the cost of the hydraulic dredging was in the neighborhood of nineteen cents a cubic yard, not including bulkhead (Record 72). If the cost of merely dredging the earth was nineteen cents a yard

for bulkhead, it is clear that there would be no profit of any kind to appellant if now allowed to proceed with his contract. As against this lack of benefit to appellant by the granting of the injunction, we have the detriment to the Port of Seattle and other interested parties by the granting of the injunction. As testified by the then port engineer, West, the filling to be done under Hays' contract

> "would fill up the slip along the east side of our wharf. If the waterway was dredged north of Garfield Street it would eliminate the land that is necessary for railroad tracks and for access to the wharf; and if the temporary type of bulkhead was used along the east line of Smith's Cove Waterway it would practically destroy the usefulness of at least half the wharf." (Record 106.)

It is further shown by the testimony of Commissioner Bridges that the port piers would be cut off from railroad communication (Record 93-117). Thus, the value of the public overseas pier, on which nearly a million dollars had been expended, would be practically destroyed, the use of the vacated portion of the waterway which had been changed to railroad tracks, and yards, and other terminal facilities, would also be destroyed, and the entire plan of improvement which has been adopted and carried out in that vicinity would be changed.

The rule is that where the damage which would result from the granting of an injunction is not commensurate with the relief which is asked, the injunction will not be granted, but instead the complainant will be left to his remedy in damages. The general principle covering this proposition is laid down in 22 Cyc. 782, where it is stated in effect that where the injunction will cause greater injury to a defendant and will confer very little benefit in comparison on the other party, it is within the discretion of the court to refuse the application, and that "in all cases the court takes into consideraion the relative inconvenience to be caused to the parties, and will refuse an injunction if it appears inequitable to issue it."

The rule is laid down in *Day v. Candee,* 7 Fed. Cases, p. 230, as follows:

> "Where by granting an injunction there would be a greater probability of producing incalculable mischief than there would be of preventing it, neither an absolute nor conditional injunction ought to be granted." (Quoting 8th paragraph of Syllabi.)
>
> "Where it is sought to enjoin a lawful business, the court should give due consideration to the comparative injury which will result from the granting or refusal of the injunction sought." *McCarthy v. Bunker Hill Co.,* 164 Fed. 928 (quoting 2nd paragraph of Syllabi.)
>
> "It is a good defense to an application for

an injunction that the wrong and injury likely to be inflicted upon the opponent of the application by its issue will probably be greater than that which the applicant is likely to suffer from its denial."

Kryptok Co. v. Stead Lens Co., 190 Fed. 767.

(Quoting 3rd paragraph of Syllabi.)

Where the public itself is a party at interest, the court will be cautious in the granting of an injunction.

"Injunctions are not matters of right, but of judicial discretion, and if it appears that the granting of an injunction, although complainant might otherwise be entitled to it, would inflict such great damage on the defendants or the public that the injury suffered by complainant if the injunction is refused will be relatively insignificant, it should not be granted."

Cubbins v. Mississippi River Commission, 204 Fed. 300. (Quoting 4th paragraph of Syllabi.)

Also, see *Ferry-Leary Land Co. v. Holt & Jeffery*, 53 Wash. 584

THE CONTRACT IN QUESTION IS NOT OF SUCH A CHARACTER THAT A COURT OF EQUITY WOULD SPECIFICALLY ENFORCE, AND THE ONLY REMEDY THAT APPELLANT NOW HAS IS AN ACTION FOR DAMAGES FOR BREACH OF CONTRACT.

Assuming that appellant has a valid contract, it seems to us clear that if the State breached it by preventing appellant from going ahead and doing the work thereunder, his sole action is one for damages.

Under the authorities, this contract was not one which could be specifically enforced; and even if enforcible in the first instance, appellant has lost such right by reason of his long delay.

In the case of *Texas etc. R. R. Co. v. City of Marshall,* 136 U. S. 393 (10 Sup. Ct. Rep. 846), the court held:

> "A contract by a railroad company with a city to locate its terminus, principal office, and machine shops therein, and to continue them there, notwithstanding its own interests and those of the public should subsequently demand their removal, is not enforceable in equity, and the city's only remedy for its breach is in damages."
>
> (Quoting 2nd paragraph of Syllabi.)

"Equity will only decree specific performance where the subject matter of the decree is capable of being embraced in one order and is immediately enforceable, and will not decree specific performance when the duty to be performed is a continuous one, extending possibly over a long period of time, and which, in order that the performance may be made effectual, will necessarily require the constant personal supervision and oversight of it by the court."

Pacific Electric Co. v. Campbell-Johnson, 94 Pac. 623. (Quoting 2nd paragraph of Syllabi.)

Also see 36 Cyc. 581, where it is held that "The general rule is well settled that contracts for building or construction will not be enforced specifically."

Granting that appellant had a valid contract in 1913, his only remedy is one for damages, and in that action the question of the validity of the 1913 act vacating a portion of the waterway will be pertinent.

In the case of *Broad v. Spokane,* 59 Wash. 268, the defendant city commenced a certain street improvement, letting a contract to the plaintiff. It thereafter decided to abandon the work under such contract and changed its plans. This was an action to enjoin such abandonment. The court held that the city had the power to abandon the improvement

and that appellant's remedy, if any he had, was by an action at law for damages. The court further stating that any other rule might result in the courts compelling the city to build a useless or wasteful structure.

HAYS vs. HILL, 23 WASH, 730.

Finally, we wish to call attention of the court to the decision of *W. F. Hays vs. James J. Hill, et al.,* reported in 23 Wash. 730. Defendants introduced the briefs in said case (see Defendant's Exhibit 0-2, 3), and also a certified copy of the transcript of the record on appeal. (See Defendant's Exhibit 0-1.) An examination of those exhibits discloses that the complaint of Mr. Hays in the Hill case was almost identical with the complaint in the case at bar. In the Hill case, as in this, Mr. Hays was seeking injunctive relief merely. We ask the court to examine carefully the relief which complainant seeks, as found in Paragraph III of his prayer. What he seeks is an injunction enjoining the defendant Port District "from exercising any act or acts of ownership, power or authority over said Smith's Cove Waterway, or in any manner interfering with or tending to interfere with the rights

of the complainant in and to said waterway in pursuance of his said contract."

The court will bear in mind that Mr. Hays makes no claim of ownership in the waterway; his only claim is ownership in a contract to excavate the waterway. He does not show that at the time of the passage of the act of 1913, vacating the waterway, he was doing anything in pursuance of his contract, or that there was even any remote probability that he ever would do anything in pursuance of his contract. On the contrary, his own evidence disclosed he never did but two or three hours' work, and that more than twenty years ago.

Assuming, for the sake of the argument, that the land commissioners did stop Mr. Hays from work in 1896 and that they were negligent in their official duty in not furnishing him plans for a proper bulkhead, is there any probability that Mr. Hays, after being unable for twenty-three years to come to any agreement respecting the bulkhead, to ever come to any agreement? If at the time the act of 1913 was passed there was no probability that Mr. Hays would ever come to an agreement with the state respecting this contract, then the contract was at best a contract on paper under which nothing would ever

be done. A court of equity would not enjoin a municipal corporation from exercising rights over this waterway merely because it interfered with a theoretical interest. In other words, a court of equity will not do a useless thing. It will not restrain one person unless that would be an aid or benefit to the complaining party. It is manifest that an injunction enjoining the defendant Port District from exercising jurisdiction over the waterway would not aid complainant one whit in arriving at an agreement with the State of Washington.

The Supreme Court of this state in *Hays vs. Hill*, 23 Wash. 730, adopted this view, and we believe under the doctrine of that case, this bill should be dismissed, even though the court does not agree with the arguments on the law and facts hereinbefore presented.

Respectfully submitted,

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